Supreme Court, U.S.
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OFFICE C.

No._____

IN THE

Supreme Court of The United States

OCTOBER TERM 2000

ROBERT L. MOORE; CHESTER R. YOUNG; LINDA BAKER; ROYAL R. ASHTON; DAVID HOLLINS; RANDALL BYRD; LEON BRICE; RONNIE HUDNALL; WADE BROOKS; ANNIE M. KELLY; CHRISTOPHER G. LATSON,

Petitioners,

v.

JAMES A. LYNAUGH, individually and in his official capacity as the Director of the Texas Department of Criminal Justice; and TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION;

Respondents.

Petition For Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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31 pp

QUESTIONS PRESENTED

Does racial discrimination against black employees in housing, job assignments, working conditions, discipline, and other terms and conditions of employment violate Title VII?

Is the employment discrimination prohibited by the anti-discrimination provisions of Title VII limited to discrimination that constitutes an "ultimate employment decision"?

Can the constitutional right to a jury trial be lost absent an explicit waiver?

Does the pendency of a class action or the intervention into a class action toll the limitations period for putative class members?

LIST OF PARTIES

Petitioners:

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Linda Baker
Royal R. Ashton
Randall Byrd
Ronnie Hudnall
Wade Brooks
Chester R. Young
David Hollins
Leon Brice
Annie M. Kelly
Christopher G. Latson

Respondents:

Texas Department of Criminal Justice, Institutional Division
James A. Lynaugh, former Director of TDCJ
Gary L. Johnson, Director of TDCJ

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The opinion of the Court of Appeals is not published. It appears in Appendix A at pp. 1a - 14a. The Findings of Fact and Conclusions of Law of the United States District Court for the Southern District of Texas are not published. They appear in Appendix B at pp. 15a -75a.

JURISDICTION

The United States Court of Appeals entered its judgment on October 12, 2000. App. A. The Court of Appeals denied Petitioner's Petition for Rehearing and suggestion for Rehearing En Banc on November 20, 2000. App. D pp. 89a - 91a. The Petitioners invoke the jurisdiction of the Court under 28 U.S.C. § 1257(1).

LEGAL PROVISIONS INVOLVED

U.S.C.A. Const. Amend. VII provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

42 U.S.C. § 2000e-2 provides:

(a) Employer practices

It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment

opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-3 provides:

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Federal Rule of Civil Procedure 39(a) provides:

(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

STATEMENT OF THE CASE

A. Proceedings In The District Court.

The Petitioners are current or former black employees of the Texas Department of Criminal Justice ("TDCJ"), the agency that operates the Texas prison system. On February 2, 1988, the employees filed suit in the United States District

Court for the Southern District of Texas after their intervention in a pending class action was denied without prejudice. R.78 Ex. 1 p.7 The Petitioners alleged widespread racial discrimination by TDCJ in promotion, transfers, terminations, discipline, working condition, job assignments, housing and other terms and conditions of employment. RI. The Petitioners asserted claims under 42 U.S.C. § 1981, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. and the equal protection clause of the U.S. Constitution. *Id.* The Court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343; 42 U.S.C. § 2000e-5(f) and 28 U.S.C. §§ 2201, 2202. *Id.* In addition to their individual claims, Petitioners sought to represent a class of all black TDCJ correctional officers who were discriminated against with respect to promotions, transfers, job assignments, discipline, termination, retaliation, hostile work environment, and other terms and conditions of employment. *Id.* On August 10, 1995, the District Court denied class certification. App. C. Despite Petitioners' right to a jury trial on some claims, the District Court held a bench trial over Petitioners' protest in May 1998.

On March 31, 1999, the District Court entered Findings of Fact and Conclusions of Law (App. B), and a Final Judgment denying Petitioners all relief. App. E. In its decision, the District Court repeatedly held that Title VII does not bar discriminatory conduct, no matter how egregious, unless that conduct rises to the level of an "ultimate employment decision." App.B pp. 21a, 24a, 36a, 47a, 50a-51a, 55a, 65a - 66a. Therefore, according to the District Court, Title VII does not prohibit blatantly discriminatory terms and conditions of employment such as segregated housing or racially discriminatory job assignments because they are not "ultimate employment decisions." *Id.* Of particular interest here are several of the District Court's holdings.

1. "Charges that white officers were assigned to the new dormitory while black officers were assigned to the old, run-down dormitory that lacked heat are not cognizable under Title VII."App. B p. 55a.

2. "There was substantial testimony from a number of TDCJ officers, both Plaintiff and non-Plaintiff, indicating that Lieutenant Foster on the Retrieve Unit until his resignation in the (sic) September of 1986 was a racist first-shift supervisor who assigned white officers, especially those from his clique ("the silver bullet"), to the better and more desirable jobs in contravention of TDCJ's stated policy of rotating assignments. Such job assignments are not ultimate employment decisions or adverse actions actionable under Title VII." (internal record citations omitted).App. B p. 55a.

3. "Title VII was intended to address 'ultimate employment decisions,' such as hiring, granting leave, discharging, promoting, and compensating, but not to address every decision made by employers that might arguably have some tangential effect upon those ultimate decisions." App. B p.65a.

B. Proceedings In The Court of Appeals.

The Petitioners filed Notice of Appeal on April 3, 1999. R.228. Jurisdiction in the Court of Appeals was proper pursuant to Federal Rules of Appellate Procedure 3 and 4 and 28 U.S.C. § 1291. On October 12, 2000, the Fifth Circuit affirmed the judgment in an unpublished opinion. App. A. The Court of Appeals noted that the Petitioners had appealed "the district court's holding that the Petitioners' claims of segregated housing and other discrimination were not actionable under Title VII because there was no ultimate employment decision." App. A p. 9a. However the Court of Appeals never addressed this contention. The Court of Appeals also did not discuss the lower court's holding that discrimination against black employees in job assignments or other terms and conditions of employment did not violate Title VII. The Court of Appeals did, however,

indicate its assent to the District Court's reasoning by indicating that allegations of discriminatory discipline were not actionable because they were not "ultimate employment decision[s]." App. A p. 11a.

Petitioners petitioned the Fifth Circuit for rehearing and for rehearing en banc. The Fifth Circuit denied both petitions on November 20, 2000. App. D.

REASONS FOR GRANTING THE WRIT

This Court should grant a writ of certiorari because (i) the opinion of the Fifth Circuit conflicts with numerous precedents of this Court and of other Courts of Appeals; (ii) the Fifth Circuit opinion seriously undermines the protections this Court has ruled Title VII was intended to provide; and (iii) the Fifth Circuit's opinion severely weakens the constitutional right to a trial by jury.

A. The Courts Below Erroneously Held That Racially Segregated Employee Housing Does Not Violate Title VII.

Departing from nearly forty years of unbroken precedent, the Fifth Circuit affirmed the District Court's holding that various acts of blatantly discriminatory conduct are not actionable under Title VII or any other civil rights law.[1] The District Court addressed one of the most glaring examples of that conduct as follows:

> Charges that white officers were assigned to the new dormitory while black officers were assigned to the old, run-down dormitory that

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[1] Since the discriminatory terms and conditions existed from the commencement of an individual's employment (*i.e.*, TDCJ would only enter into inferior employment contracts with black employees), Petitioners' alleged that Respondents' conduct also violated 42 U.S.C. § 1981, 42 U.S.C. § 1983, and the equal protection clause of the fourteenth amendment.

lacked heat are not cognizable under Title VII. App. B p. 55a.

The Fifth Circuit allowed that ruling to stand. It is startling that in the year 2000, a federal court would hold that it is legal for the State of Texas to force black employees to live in racially segregated housing that is clearly inferior to the employee housing enjoyed by their white co-workers. However, in affirming the lower court opinion, that is precisely what the Court of Appeals did.

As suggested but not fully explained by the District Court, the housing was separate but hardly equal. App B p. 55a. The testimony showed that black officers who sought on-premises housing were segregated three or four to a room in the filthy, dilapidated old dormitory which lacked heat, air conditioning, and hot water. In contrast, white officers were housed two to a room in the clean and freshly painted new dormitory where they enjoyed heat, air conditioning, hot water, new furniture, new televisions, and laundry facilities. Moreover, segregation was maintained by TDCJ's policy of assigning black officers to the old dorm even when space was available in the new dormitory. V11:292; V17:189; V18:286-89; V20:735-36, 809-10; V21:879-80.

In departing from precedent and upholding the legality of the segregated, inferior housing, the District Court cited no authority. Similarly, the Court of Appeals affirmed the District Court's holding without reference to any authority. It is clear, however, that the decisions below upholding the legality of assigning black employees to facilities that are racially segregated and clearly inferior cannot be reconciled with either the explicit language of Title VII, the decisions of another Court of Appeals or the clear guideposts of this Court's numerous employment discrimination decisions.

42 U.S.C. § 2000e-2(a) bars discrimination "with respect to . . . terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(b) prohibits the racial segregation of employees and proscribes any employer action based on race

that would "adversely affect" an employee's status. From the statutory language itself, it seems obvious that the maintenance of a system of racially segregated employee housing where black employees are provided with substandard living quarters would constitute a violation of the anti-discrimination provisions of Title VII. Until this case, in fact, no court had ruled to the contrary. Furthermore, the Ninth Circuit, the only other Court of Appeals to directly consider this issue, has determined that employee housing is covered under Title VII and that it is illegal to discriminate with respect to such housing. *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1437, *modified on other grounds*, 742 F.2d 520 (9th Cir. 1984); *Atonio v. Wards Cove Packing Co.*, 827 F.2d 439, 448 (9th Cir. 1987), *rev'd on other grounds*, 490 U.S. 642 (1989). Analogously, cases construing "terms of employment" under the National Labor Relations Act have found employee housing to be such a term or condition of employment. *See e.g. American Smelting and Refining Company v. N.L.R.B.*,406 F.2d 552, 553-54 (9th Cir. 1969), *cert. denied*, 395 U.S. 935 (1969).

This Court has never specifically held that employee housing is a term, condition or privilege of employment covered by Title VII. However, with the decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), this Court has given a meaning to the phrase "terms, conditions and privileges" that is in conflict with the decision of the Fifth Circuit. In *Meritor Savings*, this Court said that:

> the "language of Title VII is not limited to economic or tangible discrimination. The phrase terms, conditions, or privileges of employment evinces a congressional intent to strike at the entire spectrum of disparate treatment of men

and women in employment."[2]

477 U.S. at 64 (emphasis added) (internal quotation marks and citations omitted). This Court further elaborated by noting that

> the phrase terms, conditions or privileges of employment in [Title VII] is an expansive concept which sweeps within its ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.

477 U.S. at 66 (internal quotation marks and citations omitted).

The essence of *Meritor Savings* and its progeny is that the "terms and conditions" language of Title VII is designed to combat any disparate treatment that creates a hostile or offensive working environment. Severe and pervasive harassment is a form of discrimination with respect to an individual's terms or conditions of employment even if no "ultimate employment decision" occurs. *See, e.g., Meritor*, 477 U.S. at 65-68. Housing discrimination should be no different.

This Court has reiterated the broad definition of terms, conditions, and privileges of employment in subsequent cases. Seven years after *Meritor Savings*, this Court reaffirmed its central message that Title VII imposes a "broad rule of workplace equality" in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993). Furthermore, as recently as its 1998 decisions in *Faragher*, 524 U.S. at 786, and *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78 (1998), this Court has reiterated that the phrase "terms and conditions of employment" to which Title VII speaks is not to be construed in a narrow, contractual sense.

This Court should grant the writ to resolve the conflict

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2 The standards governing sexual and racial discrimination are generally analogous and thus cases involving one type of discrimination are of equal applicability to cases involving the other type of discrimination. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 n.1 (1998).

of the Fifth Circuit opinion with those of other circuits and especially with those of this Court and reaffirm that the broad scope of Title VII applies to housing discrimination.

B. The Courts Below Erroneously Held That Racial Discrimination In Job Assignments Does Not Violate Title VII

Similarly, the Court of Appeals affirmed the District Court's holding that discriminatorily assigning black officers to dangerous and less desirable jobs does not violate Title VII. As stated by the District Court, it was not actionable under Title VII that a supervisory employee of TDCJ was:

> a racist first-shift supervisor who assigned white officers, especially those from his clique ("the silver bullet") to the better and more desirable jobs in violation of TDCJ's stated policy of rotating assignments . . . [because] Such job assignments are not ultimate employment decisions or adverse actions actionable under Title VII.

App.B p. 55a.

The Court further indicated that allegations that blacks were discriminatorily assigned "to the dangerous jobs at the pickets, in the showers, the wings and the tanks" were not actionable because such "[j]ob assignments are not actionable adverse employment actions unless they constitute a demotion." App. B p.24a.

In fact, the District Court's passing references to racially discriminatory job assignments does not come close to capturing the actual level of discrimination that prevailed at TDCJ. Black officers were continually assigned to the more dangerous jobs in the prison system. In particular, they were assigned to the "wing," "tank," "shower," and "administrative segregation" areas of the prison where they were locked in alone and unarmed with the most dangerous inmates. As a result, black officers were at a far greater risk of death and serious bodily

injury than their white colleagues, who were assigned in pairs to the less dangerous areas where inmate contact was reduced. Furthermore, it was standard policy during prison disturbances to substitute black officers for white officers in disturbance areas and to return white officers to those areas only after the danger had passed. Black officers were also discriminatorily assigned to undesirable posts that were permeated by the overwhelming stench of raw sewage and could only be reached by wading through raw sewage. Black officers were also discriminatorily assigned to hot outdoor postings that lacked bathroom facilities and drinking water. In contrast, white officers were disproportionately assigned indoor jobs. V16:24-27, 208-10; V18:288-89, 350-52; V19:407-11, 551; V20:719; V21:877, 950-52.

The affirmance by the Court of Appeals of the District Court's holding that these forms of discrimination are not the kind of discrimination to which Title VII was addressed cannot be reconciled with this Court's decisions on the expansive scope of Title VII. *See, e.g., Meritor*, 477 U.S. at 64-65. In fact, this Court has indicated that undesirable job assignments are of sufficent gravity to constitute actionable discrimination under Title VII. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 724, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998). As with its holding about segregated employee housing, the decision below eviscerates the express statutory protections of Title VII and fails to adhere to the binding precedents of this Court. This Court should grant certiorari to correct this aberration.

C. The Courts Below Erroneously Held That Racial Discrimination With Respect To Other Terms And Conditions of Employment Does Not Violate Title VII.

Having erroneously concluded that Title VII would not prohibit racially segregated employee housing or discriminatory job assignments, the District Court also erroneously held that:

> Title VII was [only] intended to address "ultimate employment decisions;" such as hiring, granting leave, discharging, promoting, and compensating but "not to address every decision made by employers that might arguably have some tangential effect upon those ultimate decisions."

App. B p. 65a.

The District Court then went on to indicate that Title VII would therefore not prohibit discrimination with respect to an "employee's work schedule, shift or hours;" "increasing an employee's workload;" "denial of training necessary for promotion;" "rude and uncivil treatment;" "hostility from fellow employees;" "disciplinary filings;" "[a] supervisor's reprimands, and poor performance [evaluations];" "lateral transfers;"or "denial of administrative complaints and grievances."App. B pp. 65a-66a. The District Court further indicated that any other instances of discriminatory conduct would not be actionable including: forcing blacks to drop out of school due to a shift change (App. B p. 47a) or sending blacks home for not shaving (despite compliance with a medical shaving pass,(App. B p.36a n. 22) by a supervisor who according to the evidence, stated he "did not take his orders from no black man"). V13:86-87; V16:71-73, 79-80;V18:360-37,372, 399; V19:604-05; 614-20 V22:1095-98. The Court of Appeals affirmed and added that "employee discipline, without more, is not an ultimate employment decision."App. A p. 11a.

> Black officers also were not issued winter gear; given inferior vehicles; refused commissary services; denied food in the field; not invited to TDCJ official social gatherings; strip searched; and denied bathroom privileges (to a point where medical treatment was necessary) by white supervisors who felt that such privileges were unnecessary because blacks had "big bladders." V13:5-9, 21-22; V17:215-16; V18:320,350-52; V19:413-14; Px. 183.

Furthermore, black officers with accumulated vacation days were denied days off even after giving significant notice. Blacks were denied time off to attend their own wedding, celebrate a twenty-fifth anniversary, or take a sick child to the doctor. In contrast, white officers were able to request and receive days off with little or no advance notice for non-emergency reasons such as to watch a sporting event. Black officers were also routinely assigned holiday duties so that white officers would be able to spend time with their families. V18:474-79; V21:877, 887, 889-90; V22:1102-03.

Blacks were forced to endure a disciplinary system that invested almost exclusively white disciplinary boards with unfettered discretion to impose discipline and determine punishment. This practice resulted in black officers being disciplined more frequently and more harshly than their white co-workers with blacks, for example, being disciplined, suspended, and terminated at rates 4 to 5 times the rate of their white co-workers. V10:70-71; V11:308, 312; Px. 66. The unfairness of the disciplinary system is evidenced by the fact that blacks were disciplined for imagined or non-existent violations such as smiling (V16:50-51) or not shaving in accordance with an authorized medical pass (V16:71-73, 79-80) while white officers committing far greater offenses were not disciplined. *See, e.g.*, V14:27-28; V16:35-51; V19:414-16, 556-67; 576-79, 584-88; V20:753, 762, 809, 811; V21:880-908. This discriminatory discipline system negatively affected black employees' promotional opportunities because under TDCJ's promotion policies, an employee on disciplinary probation is ineligible for promotion. Px. 3, 10, 12-13, 16-17, 19.

In addition to being negatively impacted by TDCJ's discriminatory discipline system, blacks were not provided the same promotional opportunities as whites in that they were not informed of job openings and were mistreated during the application process. *See e.g.* V10:157-59; V19:424-26. This did not bother the District Court which held, for example, that it was not actionable that a minority applicant received the lowest

possible score at a screening interview where the warden conducting the interview

> had his feet on the desk and read a hard-core [pornography] magazine the entire time, never looked at or spoke to . . . [the applicant] and never acknowledged . . . [the applicant's] presence . . . [because] Such behavior does not constitute an ultimate employment action.

App.B, p.21a; V10:157-59; V19: 424-26.

Furthermore, the lower courts failed to discern any violation of Title VII as a result of TDCJ's dismissal or inadequate review of grievances filed by black officers; refusal to provide black officers with grievance forms; punishment of officers who assisted black complainants; and threatening or disciplining of black officers who sought to file grievances. V13:83-85; V19:617; R.120 Ex. 1-12.

As a direct result of the decisions of the Court of Appeals and the District Court, Petitioners were left bereft of a remedy for the egregious racial discrimination they suffered with respect to the terms and conditions of their employment. As discussed above, the opinions of the lower courts that such odious forms of discrimination are not actionable under Title VII cannot be reconciled with Title VII's express language and expansive scope.

D. The Courts Below Confused Retaliation Cases With Terms And Conditions Cases

The District Court, affirmed by the Court of Appeals, ruled that Title VII does not bar any discriminatory action, no matter how egregious, so long as that action is not an "ultimate employment decision." The District Court and the Court of Appeals relied exclusively on the recent decisions of the Fifth Circuit which deal with the anti-retaliation provision of Title VII (42 U.S.C. § 2000e-3) where the Fifth Circuit has imposed a requirement that a retaliatory act must constitute an "ultimate employment decision" before a violation of Title VII will be

found to exist.[3] App. A p. 11a n.14; App. B pp. 65a-66a; *see, e.g., Dollis v. Rubin*, 77 F.3d 777 (5th Cir. 1995). Both the District Court and the Court of Appeals failed to perceive, however, that the anti-retaliation provision of Title VII is far narrower than the anti-discrimination provisions of Title VII which prohibit the "entire spectrum" of unlawful employment practices and which do not require that a discriminatory act rise to the level of an "ultimate employment decision" before a violation of Title VII will be found to exist. *See, e.g., Meritor*, 477 U.S. at 64; *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 708-09 (5th Cir.), *cert. denied*, 522 U.S. 932 (1997).

By engrafting the "ultimate employment decision" requirement onto a case such as the present one that involves segregation and discriminatory terms and conditions of employment, the lower courts have rendered Title VII into a toothless statute in which minorities who are subjected to racially segregated facilities, discriminatorily assigned to dangerous, undesirable jobs, and forced to endure other discriminatory terms and conditions of employment are left without any possibility of redress. This Court should not allow such a decision to stand and should therefore grant the writ to undo this serious weakening of the remedies available to victims of employment discrimination.

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[3] In light of this Court's recent decisions in *Faragher* and *Ellerth*, the continued viability of such a requirement seems quite infirm. However, this Court has never addressed the issue of whether Title VII's anti-retaliation provision contains a requirement that a retaliatory act rise to the level of an "ultimate employment decision" before liability will arise. As a result, there is currently a split in the circuits on this issue. *See Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1996) (acknowledging that "there is a circuit split on the issue"). Even if there is an ultimate employment decision requirement in the context of retaliation, that principle has no application to a case such as this one that is based principally not on retaliation but on disparate terms and conditions of employment.

E. Stare Decisis.

This Court has repeatedly stated that "the doctrine of *stare decisis* is of fundamental importance to the rule of law." *Patterson v. McClean Credit Union*, 491 U.S. 164, 172 (1989) (*quoting Welch v. Texas Dep't of Highways and Public Transportation*, 483 U.S. 468, 494 (1987). This is true because *stare decisis* "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals." *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). Because of its importance, any departure from the doctrine of *stare decisis* requires "special justification." *Patterson*, 491 U.S. at 172. It is clear that no such justification exists in the present case and, in fact, compelling circumstances mandate the adherence to the doctrine of *stare decisis*.

This Court has recognized that our society has a "deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin." *Patterson*, 491 U.S. at 174. In fact, "every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination." *Id.* (*quoting Bob Jones University v. United States*, 461 U.S. 574, 593 (1983). As such, the doctrine of *stare decisis* requires that this Court reverse the decisions of the Court of Appeals and the District Court which would eliminate the prohibitions against segregation and discrimination that have been so enshrined in our nation's conscience and common law. Anything less and the faith of large segments of American society in the rule of law would be shattered along with this Court's institutional reputation as the dispenser of equal justice.

F. Retrial and Reconsideration of Class Certification Are Required

In the event that his Court concludes that Petitioners' claims are cognizable under Title VII, then Petitioners submit that they are entitled to a new trial on all issues, since this Court has repeatedly emphasized that Title VII claims must be

evaluated in light of the totality of the circumstances. *See, e.g., Harris*, 510 U.S. at 23. Given that the lower courts completely ignored any discriminatory act they deemed to be outside the coverage of Title VII, a new trial or at least a remand for reconsideration is required. Although this is particularly true with respect to Petitioners' hostile work environment claims, it applies to all of the Petitioners' claims due to the intertwined nature of the claims and the fact that the acts of discrimination disregarded by the lower courts would be highly probative evidence germane to Petitioners' other claims.

Similarly, if this Court determines that the anti-discrimination statutes of Title VII are not limited to "ultimate employment decisions," then the lower courts' denial of class certification must be revisited as the lower courts' analysis of Petitioners' class claims completely ignored any discriminatory act not rising to the level of an "ultimate employment decision." If the discriminatory conduct ignored by the lower courts does fall within the ambit of Title VII, Petitioners would be suitable class representatives because the Petitioners suffered injuries identical to those of the class members they seek to represent (in particular that they were subjected to segregated housing, discriminatory job assignments, discriminatory discipline, a hostile work environment, and other discriminatory terms and conditions of employment) and the Petitioners satisfy all of the requirements of Fed. R. Civ. P. 23.

G. The Court Of Appeals Erroneously Held That The Right To A Jury Trial Could Be Lost Without The Existence Of An Explicit Waiver.

The Court of Appeals held that Petitioners had waived their right to a jury trial despite the complete absence of any act capable of constituting a waiver. App. A p.6a.

The Court of Appeals' holding is in direct conflict with this Court's decisions which uphold the fundamental importance of the constitutional right to a trial by jury and indicate that "courts indulge every reasonable presumption against waiver."

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666, 682 (1999) (*quoting Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 307 U.S. 389, 393 (1937). The Court of Appeals' holding is also at odds with FED. R. CIV. P. 39(a) which provides that once requested, a jury cannot be waived absent a joint stipulation by the parties consenting to a bench trial, something which did not happen here.

On May 18, 1998, the first day of trial in this action, the parties and the District Court agreed that Petitioners had a right to a jury trial on some of their claims. V16:3-9.[4] The only issue was whether the jury claims would be tried first in accordance with this Court's opinion in *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 550 (1990) or would be separated out for trial at a future date. V16:3-9. Petitioners requested that a jury be empaneled and that all claims be tried to a jury whose verdict would be advisory as to the non-jury claims. V16:3-4. The District Court rejected this request and indicated that it intended "to start off with the bench trial part and then to do the jury parts later on." V16:6. The District Court's stated reason for doing so was that it had not empaneled a jury and did not want to wait the day or so to empanel the jury and conduct voir dire. V16:4-8. When Petitioners' counsel expressed confusion as to why no jury had been empaneled, it became clear that the case manager had been misled by Respondents' counsel into believing that the matter was to be tried initially to the bench. V16:4-5. Respondents' counsel sought to justify his actions by indicating that it was his understanding from the pretrial conference that the case would be tried first to the bench and the jury claims would be separated out "for a future date." V16:5.

Over the protests of Petitioners' counsel, the District

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[4] There was agreement that certain Petitioners had post-1991 Title VII claims although the exact number of these individuals was in dispute. V16:3-9. In addition, Petitioners submit that they had § 1981 and § 1983 claims that were never dismissed.

Court indicated it would not empanel a jury but would instead "start off with the bench trial part and then . . . do the jury parts later on" even though there was an overlap of issues and the case would have to be tried twice. V16:3-9. Their protests overruled, Petitioners had no choice but to proceed with the bench trial portion of the case. Petitioners were led to believe, however, that following the bench trial there would be a jury trial on the remaining claims. V16:6. However, the District Court issued a Final Judgment on all claims including the Petitioners' untried jury claims and closed the case, thereby depriving Petitioners of both their constitutional right to a jury and their due process right to be heard at all. App. E.

The Fifth Circuit found no error in the District Court's denial of Petitioners' constitutional rights. App. A p. 6a. Inexplicably, the Court of Appeals indicated without discussion or analysis that it was "persuaded that any rights to a jury trial were waived." *Id.* However, Fed. R. Civ. P. 39(a) provides there can be no such waiver except by written stipulation or an oral stipulation in open court. There was no such stipulation and no court has attempted to cite one. Futhermore, given the District Court's explicit statement that Petitioners' jury claims would be tried "later on" (V16:6), the Court of Appeals' determination is demonstrably false. The error of the Court of Appeals' opinion is further confirmed by the fact that the pretrial order filed May 13, 1998 called for a jury (R.206); the parties filed proposed jury instructions (V16:4-5); and the docket entry sheet for May 18, 1998, the first day of trial indicates it was "day 1 of Jury Trial" and that "Plaintiffs move to have entire case tried to jury as an advisory jury on non-jury issues."

Although it did not explain its ruling, the Court of Appeals indicated that its analysis involved a review of the record including the transcript of a pretrial conference held on April 19, 1998, a day when no pretrial conference was held. App. A p.6a. Assuming the Court of Appeals referenced the April 29, 1998 pretrial conference, the events at the April 29, 1998 pretrial conference would still not support its opinion as

the transcript of this conference indicates at best a desire to separate out the jury claims from the non-jury claims and does not evidence any waiver whatsoever of the right to a jury trial. This fact is confirmed by the docket entry for this conference which indicates "jury selection/trial set for 9:00 5/18/98." Furthermore, the subsequent pretrial order and the actions of the parties and the District Court indicate that no waiver occurred at this conference. R.206; V16:3-9.

The Court of Appeals also indicated that any denial of the right to a jury would be harmless if the Petitioners' claims would not have survived a directed verdict. App. A pp. 6a-7a. While this may be true, it is inapplicable to the present case where Petitioners' claims survived a request for a directed verdict. V23:1190. This Court should grant certiorari to correct the denial of Petitioners' constitutional rights to a jury trial. In light of the above, this decision should be reversed because of its grave weakening of the constitutional right to a jury.

H. The Court of Appeals Incorrectly Held That Petitioners' Claims Were Not Subject to Tolling.

The Court of Appeals conceded that a pending motion to intervene tolls the 90 day period after receipt of a right to sue letter. The Court of Appeals nevertheless held that several of the Petitioners could not rely on their motion to intervene in *Jones v. Texas Department of Corrections*, C.A. No. TY-87-364-CA to toll the 90 day period. App. A pp. 4a-5a. No legal support exists for this position. If allowed to stand the Court of Appeals' ruling will burden federal courts with duplicatives action and cause unnecessary barriers to judicial efficiency.

On February 24, 1987, Petitioners timely sought to intervene in *Cirillo v. Texas Department of Corrections* (C.A. No. TY--77-12-CA) which then encompassed *Jones*. App. B p.19a. n.8. On September 3, 1987, when *Jones* was severed from *Cirrillo*, the court denied Petitioners' intervention in *Cirillo* but explicitly held that its denial was "without prejudice to resubmission" thereby allowing Petitioners to seek to intervene

in the newly severed *Jones* action." R 78, Ex 2, p. 13. The court acknowledged that Petitioners' initial intervention was premised on the fact that "their rights were affected by the ongoing class action maintained by David Jones" and indicated the court's order was designed to allow Petitioners to "account for the new posture of Jones' action." *Id.*, p. 7, 12-13. Petitioners' intervention in *Jones* was denied on January 4, 1988. App. B p.19a n.8. This denial was explicitly premised on the *Jones* court's belief that "[t]here is no reason to presume that . . . [the Petitioners] cannot maintain their own action." R.78, Ex. 1 p.5-7. On February 2, 1988, Petitioners filed this action. R.1. The Court of Appeals held that while Petitioners' initial intervention in *Cirillo* was sufficient to toll the 90 day period, their subsequent intervention 14 days later into the newly severed *Jones* action did not result in tolling and as a result, the claims of several of the Petitioners would be barred. App. A pp. 4a-5a. This holding of the Court of Appeals ignores the fact that *Cirillo/Jones* was a single action when Petitioners first sought to intervene and Petitioners' second motion to intervene was not into an unrelated action but into a portion of the action in which they had initially sought to intervene. R. 78, Ex. 2. Even if Petitioners' motion to intervene in *Jones* did not toll limitations, Petitioners nevertheless timely filed suit because under this Court's holding in *Crown, Cork, and Seal Co. Inc. v. Parker*, 462 U.S. 345 (1983), the pending putative *Jones* class action (which was brought on behalf of all black TDCJ employees, a class which encompassed all of the Petitioners) tolled Petitioners' limitations until September 30, 1991 when class certification in *Jones* was denied. RE.9, p. 91-92. In fact, until denial of certification in *Jones*, Respondents maintained that Petitioners could not litigate their promotion claims because they were encompassed within Jones' class claims. *See, e.g.*, R.68, p. 6. Given that class certification was not denied in *Jones* until 1991, it is difficult to understand how the Court of Appeals believed Petitioners' claims were barred in 1988.

In addition to Petitioners' right to tolling due to the pendency of the putative *Jones* class action, Petitioners should also have been able to rely on equitable tolling since they acted pursuant to an explicit judicial order. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984). Equitable tolling should also have been available to Petitioners because Respondents attempted to block Petitioners' filing suit by arguing that Petitioners' promotion claims were on hold until *Jones* was resolved. *Id.*; R.68, p. 6.

If the Court of Appeal's Opinion is allowed to stand, then the federal courts will be burdened with duplicative actions because parties will no longer be able to rely on the well reasoned tolling decisions of this Court. Therefore, for reasons of judicial efficiency (as well as *stare decisis*), this Court should grant the writ to correct the erroneous decision of the Court of Appeals.

CONCLUSION

For the reasons stated above Petitioners request that this Court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Supreme Court, U.S.
FILED

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No._____

IN THE

Supreme Court of The United States

OCTOBER TERM 2000

ROBERT L. MOORE; CHESTER R. YOUNG; LINDA BAKER; ROYAL R. ASHTON; DAVID HOLLINS; RANDALL BYRD; LEON BRICE; RONNIE HUDNALL; WADE BROOKS; ANNIE M. KELLY; CHRISTOPHER G. LATSON,

Petitioners,

v.

JAMES A. LYNAUGH, individually and in his official capacity as the Director of the Texas Department of Criminal Justice; and TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION;

Respondents.

Appendices To The Petition For Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit

APPENDICES

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APPENDIX A

U.S. COURT OF APPEALS
FILED
OCT 12 2000
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CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20547

ROBERT L. MOORE; CHESTER R. YOUNG; LINDA BAKER; ROYAL R. ASHTON; DAVID HOLLINS; RANDALL BYRD; LEON BRICE; RONNIE HUDNALL,
Plaintiffs-Appellants,

WADE BROOKS,
Intervenor Plaintiff-Appellant,

ANNIE M. KELLY,
Appellant,

CHRISTOPHER G. LATSON,
Movant-Appellant

versus

JAMES A. LYNAUGH, individually and in his official capacity as the Director of the Texas Department of Criminal Justice;
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,

INSTITUTIONAL DIVISION,
Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Texas
(H-88-CV-295)

Before JOLLY, HIGGINBOTHAM, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

I

After years of pretrial discovery and motions practice, the common jousts by able lawyers, this case, though complicated below, reaches this court with relatively straightforward controlling issues. We ultimately find no error in the district court's denial of class certification and disposition of individual claims following a bench trial.

The appeal arises out of Title VII, § 1981, and claims brought by black correctional officers employed by the Texas Department of Criminal Justice. The eleven plaintiffs complained of a wide variety of conduct by superiors at the Department, including denied promotions, unjustified suspensions or terminations, racial slurs, inferior postings, and segregated housing. They argued that subjective criteria

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*Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47. 5. 4.

were used to make promotion decisions and that black corrections officers were wrongly denied promotions; that statistically, black corrections officers were disciplined and terminated at a dramatically higher rate than white or Hispanic officers; that black officers were given posts that were more dangerous and less likely to lead to promotions; that black officers were given living quarters of lesser quality than those given to white and Hispanic officers; and that black officers were subjected to a racially hostile work environment, including the frequent use of derogatory racial terms and the leaving of Ku Klux Klan literature at officers' post.

The plaintiffs initially sought to intervene in the *Cirillo* class action. After the claims of the black plaintiff, David Jones, were severed from *Cirillo*, the plaintiffs sought to intervene in the *Jones* class action. The *Cirillo* and *Jones* cases were pending in the same court. After intervention in these pending class actions was denied, the court denied independent certification of the *Moore* class and tried the claims individually in a bench trial. The court denied the plaintiffs' claims in a 76-page opinion, and the plaintiffs timely appealed.

II

1

The Moore plaintiffs raise several arguments that have no dispositive effect on the case, as we will explain. They make two objections to the district court's holding that most of their Title VII claims were time-barred; that they had 300 days, not 180 as the district court ruled, to file an EEOC charge after an adverse employment action; and that the district court erred in holding that the plaintiffs' claims were untimely because they had not filed within 90 days of the denial of their motion to intervene in a pending class action. [1] They also argue that their § 1981 claims were improperly dismissed.

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[1] The district court initially ruled in favor of plaintiffs on this issue but reconsidered the issue sua sponte after trial.

The problem with both timeliness arguments is that the district court's opinion notes the timing issues but goes on to address each of the plaintiffs' claims on the merits. Prevailing on these issues thus would not change the outcome of the case.

The court found that the claims of four of the plaintiffs were time-barred.[2] The court did not base its conclusion on the 180 day time limit for filing an EEOC charge. Instead, the court determined that the claims of these plaintiffs, who had already received right-to-sue letters from the EEOC, were time barred because they failed to file suit within 90 days after their motion to intervene in another suit, *Cirilo v. Texas Department of Corrections*, No. TY-77-12-CA, was denied. The filing of a class action tolls the limitations period for members of the putative class until class certification is denied, at which time plaintiffs have 90 days to file suit.[3] Since these four plaintiffs sought to intervene in the *Cirilo* class action and were not permitted to do so,[4] the district court properly concluded that their claims were time-barred once they failed to file suit within 90 days of that denial. Whether the district court erred in applying a 180-day limitation period for filing an EEOC charge is irrelevant to these plaintiffs' claims, since the court found that they had received right-to-sue letters but failed to file suit within the 90 day period following the denial of their motion to intervene in the *Cirilo* class action.

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[2] Plaintiffs Moore, Ashton, Hollins, and Brice.

[3] *See Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 354 (1983).

[4] The *Cirilo* court denied the *Moore* plaintiffs' motion to intervene when the *Cirilo* class was redefined to include two subclasses; one of Mexican-American plaintiffs who alleged a hostile work environment and discriminatory hiring practices based upon their national origin, and a second subclass of black applicants who alleged that they were not hired by the Texas Department of Criminal Justice on account of their race.

The plaintiffs argue that the limitations period continued to be tolled because they attempted to intervene in another pending class action, *Jones v. Texas Dep't of Corrections*, No. TY-87-364. The district court correctly concluded that the plaintiffs could not use both class actions to toll the running of the limitations period for filing suit. This court has previously refused to allow a putative class to "piggyback" one class action upon a previous one in an effort to continue to toll the limitations period for a Title VII suit, reasoning that the practice would be too easily abused.[5] Here, the *Moore* plaintiffs believed they could continue to toll the limitations period as they shopped for a pending class action rather than file their own, and the district court properly rejected their effort to do so. The plaintiffs argue that they did not try to "piggyback" two identical class actions, since *Cirillo* and *Jones* were different suits with different issues. However, the *Moore* plaintiffs were the same group of plaintiffs with the same issues on each motion to intervene, and the district court properly applied the reasoning of *Salazar-Calderon* to conclude that the *Moore* plaintiffs could not toll the limitations period in successive motions to intervene in pending class actions.

In any event, the court considered and rejected their claims on the merits. Similarly, the district court addressed the merits of the plaintiffs' claims regarding denied promotion, which Moore contends were actionable under § 1981. The district court concluded that none of the plaintiffs was denied a promotion based on race.

III

The Moore plaintiffs also argue that the district court erred in failing to address their § 1983 claims. Plaintiffs may sue both under § 1983 and Title VII if the employer's conduct

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[5] *See Salazar-Calderon v. Presidio Valley Farmers Ass'n.*, 765 F.2d 1334, 1351 (5th Cir. 1985).

violates a separate constitutional right in addition to Title VII.[6] Recently, this court reaffirmed that Title VII and § 1983 are not mutually exclusive remedies, and that a plaintiff may pursue claims under both statutes.[7]

None of the court's orders issued throughout the case reference a § 1983 claim, but the introductory paragraph of the final order of the district court recites that the plaintiffs alleged, inter alia, violations of the Equal Protection Clause. The order does not address any claim brought under § 1983. We have reviewed the pretrial order and briefs to the District Court. We are persuaded that no claim under 42 U.S.C. § 1983 was filed or presented.

IV

Moore argues that the plaintiffs were erroneously denied a jury trial. Where a plaintiff brings both §1981 claims and pre-1991 Title VII claims, a jury must decide the § 1981 claims before the court hears the Title VII claims.[8] The plaintiffs assert that they were denied a jury trial over their protest, and that the court gave as its reason for the denial that it did not want to waste a day in voir dire. The Department argues that the Moore plaintiffs agreed to a bench trial below and complain only now that they wanted a jury trial. We have reviewed the record, including the transcript of the docket call proceedings of April 19, 1998. We are persuaded that any rights to a jury trial were waived. If the district court decided there in a way that it is

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[6] *See Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1753 (5th Cir. 1989).

[7] *See Southard v. Texas Bd. of Criminal Justice*, 144 F.3d 539, 548-49 (5th Cir. 1997).

[8] *See Lytle v. Household Mfg. Inc.*, 494 U.S. 545, 550 (1990).

clear that the claim would not have survived a motion for directed verdict, there is no prejudice even if there was no waiver of a jury.

V

The district court refused to certify the requested class because it concluded that the named plaintiffs could not adequately represent the interests of the proposed class, commonality and typicality were not met, and the geographic and temporal scope of the alleged events were overbroad.

Class certification in an employment discrimination suit is not proper where the named plaintiff did not suffer the same type of injury as other members of the proposed class.[9] The court determined that the named representatives lacked standing to pursue the claims of members of the proposed class. To possess standing, plaintiffs, as a class, must have suffered the type of injury for which they seek to recover; membership in a common racial, ethnic or economic group is insufficient.[10] Having suffered injury is not sufficient to create standing to press claims for a qualitatively different kind of injury.[11] The district court determined that the proposed class should not be certified because its members suffered different injuries. Some alleged that they were not promoted because of discriminatory practices in promotion. Others claimed that they were targeted for discipline by superiors because of their race. All complained of a racially hostile environment at the Retrieve unit around 1985 to 1987. The court determined that the plaintiffs sought to represent all black corrections officers in TDCJ, but that the

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[9] *See General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 (1982).

[10] *See Warth v. Seldin*, 422 U.S. 490, 502 (1975).

[11] *See Blum v. Yaretsky*, 457 U.S. 991, 1001-02 (1982).

plaintiffs had not suffered injuries of the type they claimed to be suffered by black corrections officers throughout TDCJ.

The plaintiffs argue that the district court improperly based its denial of class certification on the merits of their claims. The trial court may determine whether the named class representative suffered an injury that gave him standing to represent the class. [12] The court determined that the plaintiffs had not suffered injuries of the type they sought to represent. For example, plaintiff Hall admitted that his scores on qualifying examinations for electrical and pluming maintenance jobs were low, and he was promoted to food service manager, which was outside the proposed plaintiff class of security employees. Latson admitted that he never applied for a promotion. Moore sought to skip from guard to lieutenant without working as a sergeant and that he later stopped applying for promotions, although application was required. Plaintiff Hudnall, who was terminated, had a long history of disciplinary actions taken against him. Plaintiff Kelley complained that she was denied promotions to various positions, none of which were the correctional positions sought to be represented by the proposed class. Furthermore, the court determined that while the complaints of the plaintiffs were limited to 1985-1987 at the Retrieve unit of TDCJ, the class they sought to represent expanded into the past and the future, and included 48 penal institutions and 6 detention centers, with which the plaintiffs had no connection. Rather than reaching the merits of their claims, the district court properly determined that these plaintiffs were not able to adequately represent the interest of the proposed class of black corrections officers because they had not suffered injury to their interests in promotions within that class; that this was an effort to proceed as an "across the board" claim of discrimination. We find no error in the denial of certification and no abuse of discretion.

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[12] *See Johnson v. Rodriquez*, 110 F.3d 299, 315 (5th Cir. 1997).

VI

(i) Robert L. Moore

Moore raises several challenges to the district court's resolution of the Title VII claims. Moore appeals the district court's holding that the plaintiffs' claims of segregated housing and other discrimination were not actionable under Title VII because there was no ultimate employment decision. Moore also challenges the district court's factual findings on the plaintiffs' claims of hostile work environment and retaliation.[13]

Moore presents no facts or argument explaining which factual conclusions of the district court were in error. Moore does not confront the district court's conclusion that the employment actions taken against the plaintiffs were based on infractions of rules, such as failing to fire at escaping inmates, betting with inmates, or stopping at a guard's house in the course of transporting an inmate. Moore also presents no rebuttal to the district court's conclusion that the incidents of racial slurs and Ku Klux Klan pamphleting were not sufficiently pervasive and were counteracted by steps taken by the Department.

(ii) Chester R. Young

Young claimed that he was not promoted to various jobs as a mechanic or in food service, but that white employees were given those positions rather than he because he was black. Testimony from Carol Jones of TDCJ's human resources department showed that Young did not apply for most of the positions about which he complained and that he was not qualified for the positions or less qualified that the candidate

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[13] Moore also disputes the standard applied for burden-shifting purposes, arguing that direct evidence was presented that makes the *McDonnell Douglas* test inapplicable. The plaintiffs correctly note that *McDonnell Douglas* burden shifting is inappropriate in cases in which the plaintiff relies on direct evidence of discrimination. *See Brady v. Fort Bend County*, 145 F.3d 691, 711 (5th Cir. 1998). Since the plaintiffs relied on circumstantial evidence of discrimination, the district court did not err.

selected. The court also found misrepresentations and inconsistencies on the applications that Young filed.

Young claims that he was subjected to racially hostile work environment, with Ku Klux Klan literature found at his posts and hearing racially derogatory terms used. The court found that Young was not subjected to a racially hostile work environment because the incidents were not sufficiently severe or pervasive to be actionable.

(iii) Linda Baker

Baker filed her EEOC charge November 20, 1987, so her claims of discriminatory failure-to-promote in 1984 and 1985 were not timely asserted, since these were more than 300 days prior to the filing of her charge of discrimination. Baker was terminated October 12, 1987. She claimed that her termination was in retaliation for her complaints of discrimination. The district court found that Baker was terminated because four inmates escaped near her post and she made no effort to prevent their escape, for example, by firing her weapon as authorized to prevent escapes. Furthermore, Baker had a long history of disciplinary actions taken against her. Baker argues that white officers had not been terminated because of escapes. The Department pointed out that a white officer manning another picket was recommended for termination as a result of the escape for which Baker was terminated.

(iv) Royal R. Ashton

Ashton claims that he was discriminatorily disciplined and denied a pay increase because of his participation in the "officer's rebellion": a meeting of black corrections officers to discuss race discrimination at the Retrieve unit. The district court found that document evidence showed that Ashton was chronically absent or late to work without excuse and that

during 1985, when Ashton claimed he was targeted for retaliation, he was absent or late without excuse 9 times.

(v) David Hollins

Hollins claims that he was discriminatorily disciplined and not promoted because of his race. The district court found that document evidence showed that Hollins was frequently absent from work without excuse, disciplined for insubordination for swearing at a superior, and disciplined for wearing an improper or partial uniform. Employee discipline, without more, is not an ultimate employment decision actionable under Title VII.[14] Hollis is still employed as a corrections officer by TDCJ. The district court correctly concluded that Hollins had no cause of action based upon the disciplinary actions taken against him; that he failed to prove his failure to promote claim. In any event, his employment history would provide a race-neutral reason for not promoting him. We find no error.

(vi) Randall Byrd

Byrd was suspended for allegedly falsifying an inmate count sheet and verbally reprimanded for leaving a steel milk can in the cell of an inmate with psychological problems. He was recommended for termination and failed to attend the termination hearing. He was subsequently terminated, and he claims that his termination was in retaliation for his complaints of discrimination. Byrd denies that he falsified the inmate count sheet. He appears to argue that because he was fired three weeks after filing an EEOC charge, there is proof that his termination was in retaliation for his filing that charge.

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[14] *See Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 708 (5th Cir. 1997).

However, Byrd filed his first EEOC charge November 13, 1985, and he was suspended for the count sheet matter August 22, 1985. This was the incident that led to his termination. The district court properly concluded that Byrd's claims are meritless and we find no error in that judgment.

(vii) Leon Brice

Brice alleged he was discharged because of his race. Brice was discharged for betting on a football game with an inmate. Brice argues that white officers too gambled with inmates and were not terminated. He does not identify any of these officers in his brief. The district court properly concluded that Brice failed to show that the neutral reason TDCJ offered for his termination was pretext for discrimination.

(viii) Ronnie Hudnall

Hudnall was terminated for excessive absenteeism. Documentary evidence showed that Hudnall was frequently absent without excuse. Hudnall argues that white and Hispanic officers were not disciplined for lateness or absenteeism, and he states that he was told by someone that white supervisors were out to "get him" after he filed his EEOC charge. Hudnall does not identify any white or Hispanic officers in his brief who were not disciplined or terminated for similar infractions. The district court properly concluded that Hudnall failed to offer evidence to rebut TDCJ's race-neutral reason for his discharge.

(ix) Annie M. Kelley

Kelley complained that she was subjected to a racially hostile work environment and passed over for promotions that went to white employees. She specifically indentifies only one incident in which another officer used a racial slur in her

presence, which was directed toward her. She fails to show evidence from which the district court could have concluded that racially offensive comments were severe or pervasive enough to support a hostile work environment claim. Furthermore, she fails to identify any white employee who received a promotion for which she applied, so it is impossible to determine whether the district court properly concluded that Kelley failed to show that she was better qualified that white employees who received promotions.

(x) Christopher Latson

Latson was suspended for making an unauthorized stop at another officer's apartment during an ambulance run. The other officer was also suspended. Latson argues that he should not have been suspended because the other officer was of a higher rank Latson was later terminated for failing to comply with sick leave policy, for failing to return from disability leave and failing to provide required documentation of his disability. Latson asserts that he complied with the policy, but he does not state that he returned to work as required or provided the required documents. Latson argues that the discipline and termination were in retaliation for his complaints of discrimination. The district court properly concluded that Latson failed to offer evidence to rebut TDCJ's nondiscriminatory reason for these actions.

(xi) Wade Brooks

Brooks was suspended without pay and subsequently terminated. While on probation for unexcused absences from work, Brooks was suspended for failure to load his weapon while on patrol. On his return, he was on picket duty at the Eastham unit and failed to obey an order to call in to his supervisor every 30 minutes. Brooks argues that he did not have to obey this order because, although he was on duty in the

Eastham unit, the practice of calling in was peculiar to the Eastham unit and not an agency-wide policy. The Warden ordered Brooks to appear in his office to discuss this incident, and Brooks failed to appear. Brooks also failed to attend his termination hearing. Brooks claims that he told the Warden that everyone in the unit acted "like they're in the Klan, " to which the Warden allegedly replied "[y]ou damn right, and I'm the ringleader. I suspended you and that's that, try and file a grievance." The district court's findings of fact are reviewed for clear error.[15] The district court properly concluded that Brooks failed to show that his suspension and termination were pretext for race discrimination.

VII

The district court did not err in finding some of the plaintiffs' claims time-barred, since these plaintiffs failed to file suit within 90 days after their motion to intervene in a pending class action was denied. There were no claims made under § 1983. Any right to a jury trial on a §1981 claim was waived. In any event, the few claims for which there would be a right to a jury trial did not reach trial.

The district court properly denied class certification, because the named plaintiffs have claims that are individualized and different from one another, and because they sought to represent a class that was overly broad in temporal and geographic scope.

AFFIRMED.

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[15] *See Black v. Food Lion*, 171 F.3d 308, 310 (5th Cir. 1999).

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
MAR 31 1999
MICHAEL N. MILBY, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT L. MOORE, CHESTER R. YOUNG, LINDA BAKER, LORENDA WASHINGTON, ROYAL R. ASHTON, DAVID HOLLINS, RANDALL BYRD, LEON BRICE, RONNIE HUDNALL, ANNIE M. KELLY, CHRISTOPHER LATSON, AND WADE BROOKS, Plaintiffs	}	
VS.	}	CIVIL ACTION NO. H-88-295
TEXAS DEPARTMENT OF CRIMINAL JUSTICE-INSTITUTIONAL DIVISION AND GARY L. JOHNSON INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF CRIMINAL JUSTICE, Defendants	}	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above referenced disparate treatment action alleges racial discrimination against African-American Plaintiffs Robert L. Moore, Chester R. Young, Linda Baker, Royal R. Ashton, David Hollins, Randall Byrd, Leon Brice, Ronnie Hudnall,

Annie M. Kelly, Christopher Latson, and Wade Brooks[1] in respect to promotion, transfer, work assignments, compensation, disciplinary matters (including reprimands, suspension, probation, and termination), retaliation, and hostile work environment caused by racially discriminatory policies, practices, procedures, customs and usages in violation of the fourteenth amendment of the Constitution, Title VII, 42 U.S.C. sections 2000e *et seq.*, the equal protection clause of the fourteenth amendment to the federal Constitution, and 42 U.S.C. section 1981,[2] during their employment by the Texas Department of Criminal Justice--Institutional Division ("TDCJ") as Correctional Officers ("COs").

This action pursuant to agreement of the parties was tried to the bench from April 18-28, 1998. All evidence admitted in the earlier class certification hearing, held in December 1994 and April 1995, was incorporated by agreement of the parties into the trial evidence.[3]

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[1] Of the named Plaintiffs in this action, only Kelly, Hollins, and Young are still employed by TDCJ.

[2] Specifically, after the Court's order of partial dismissal on July 13, 1994 (instrument #123), and its granting of summary judgment in favor of Defendants as to Plaintiffs' intentional infliction of emotional distress claim on February 13, 1997 (#188), still pending are claims against the Texas Department of Criminal Justice under Title VII, and against Gary L. Johnson in his official capacity for prospective equitable relief, if warranted, under section 1981, pursuant to the doctrine of *Ex parte Young*, 209 U.S. 123 (1908).

This suit was originally filed against James A. Lynaugh as director of TDCJ-ID. A successor to a public official is automatically substituted as a party to a suit. Thus Gary L. Johnson has been substituted for James A. Lynaugh. Fed. R. Civ. P. 25(d)(1).

[3] This suit was originally brought as a putative class action on behalf of all black correctional officers from September 1977 until the present. In an order entered on August 10, 1995, this Court denied Plaintiffs' motion for class certification. Instrument #147.

After reviewing the voluminous record, including the testimony at the hearing and the trial and documentary evidence admitted throughout the course of the litigation, and the applicable law, the Court issues the following findings of fact and conclusions of law. Moreover, now that the Court has a clearer and more nearly complete understanding of the facts and legal issues of this case, it has reconsidered several issues on which it earlier denied dismissal and/or summary judgment.

FINDINGS OF FACT

While there may well have been racial employment discrimination during the time in dispute in the Texas Department of Criminal Justice--Institutional Division ("TDCJ"), and its predecessor, the Texas Department of Corrections,[4] the Court finds that the remaining named Plaintiffs have failed to meet their burden of proof in establishing such discrimination in regard to their own individual employment.[5] Specifically, Plaintiffs have failed to demonstrate that the race-neutral reasons put forth and supported with evidence by their employer, TDCJ, for the adverse employment actions taken against them were pretextual and that the real motivation for

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[4] Pursuant to a statutory reorganization, on September 1, 1989 the Texas Department of Corrections became the Texas Department of Criminal Justice--Institutional Division. For the sake of simplicity, the Court uses "TDCJ" to refer to the agency regardless of time period.

[5] A major difficulty with this lawsuit suit is identifying the claims since there are no controlling pleadings (neither the last, fourth amended complaint (#101) nor the joint pretrial order (#206) that specify the particular claims of each Plaintiff. Defendants have apparently never objected and thus have waived a more definite statement. In its analysis the Court has used the charges filed with the Equal Employment Opportunity Commission ("EEOC") to identify those claims that were properly and timely exhausted. It has also examined various pleadings and exhibits in the record and the testimony heard and evidence admitted during the class certification hearing and the trial for claims that may relate to Plaintiffs' hostile work environment claim.

such actions was racial discrimination of retaliation for engaging in a protected activity. Nor have they shown sufficiently a pattern of severe or pervasive racial harassment that altered the conditions of their employment, unreasonably interfered with their work performance, and destroyed their opportunity to succeed in the workplace in order to prevail to support their claim of hostile or abusive work environment.

ROBERT MOORE

Robert Moore's charge of discrimination, filed with the Equal Employment Opportunity Commission ("EEOC")[6] on November 13, 1985 (Plaintiffs' Class Certification Hearing ("CC" Ex. 49), alleges that in April 1985 on the Darrington Unit he was deprived of a promotion from his position as a CO III to that of Building Lieutenant because of his race, even though he was more qualified than the white employee who obtained the position. The charge was filed more than 180 days after the denial of the promotion and is the claim is therefore untimely. The charge generally asserts that "TDC discriminates against black correctional officers as a class with regard to promotions, terms and conditions, harassment, hiring and discharge." His right to sue letter from the EEOC is dated March 6, 1987 and advised Moore that he had ninety days from receipt of the letter to file suit in federal court.

Moore's denial of promotion claim is also time-barred for failure to file suit within ninety days of receipt of his right to sue notice and/or after the tolling period for participation in a separate class action expired. While limitations was tolled until denial of the *Moore* Plaintiffs' motion to intervene in *Cirilo v. Texas Department of Corrections*, C.A. No. TY-77-12-CA, in the United States District Court for the Eastern District of Texas, Tyler Division, on September 3, 1987, he and other

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[6] Named Plaintiffs' EEOC charges are compiled in Exhibit D to Defendant's supplemental motion to dismiss and motion for summary judgment (#111).

Plaintiffs cannot rely on the subsequent motion to intervene in *Jones et al. v. Texas Department of Corrections*, C.A. No. TY-87-364, pending in the same district, to toll limitations further.[7] *See* Conclusions of law ¶¶ 2-4. Moore's EEOC charge, filed on 11/3/85, was the earliest filed in this action. Moore received his right-to-sue letter on March 6, 1987. Once the motion to intervene in *Cirilo* was denied on September 3, 1987, Moore had ninety days to file suit.[8] He and some other Plaintiffs, identified *infra,* failed to file this action until February 2, 1988.

Nor is there a continuous violation here. The denial of promotion claim was a discrete act that had a material and obvious effect and should have given Moore notice of the need to file suit timely, i.e., within 180 days of its occurrence and, once he had previously received his right-to-sue letter, within ninety days of the subsequent denial of his motion to intervene in the *Cirilo* class action.

Even if the claim were not procedurally time-barred, Moore still fails in showing that TDCJ's reasons for not selecting him for the Lieutenant's job were pretextual and that racial discrimination actually motivated the adverse employment action. Moore contends that the promotion procedures used in evaluating him were the same as those used in the prison system

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[7] The *Jones* action challenged the promotion policy of TDCJ from 1975-85. Thus *Jones* deals nearly entirely with an earlier period and different promotion policy. The only *Moore* Plaintiff overlapping the *Jones* suit is Robert Moore, who was denied a promotion to Building Lieutenant under the policy in effect from 1983-March 1985 but, as will be discussed, which had no disparate impact on Moore.

[8] In *Cirilo*, on September 3, 1987, the district court severed the claims of David A. Jones and Eugenio Alvarez and denied as moot the motion to intervene filed by Plaintiffs here. Subsequently on September 17, 1987 Plaintiffs here filed a motion to intervene in *Jones et al. v. Texas Department of Corrections*, C.A. No. TY-87-364. The motion to intervene in *Jones* was denied on January 4, 1988. They then filed the instant suit on February 2, 1988.

from 1977-1985, and thus he can rely on the EEOC claims timely filed in these two earlier filed cases. As noted, he cannot.

Under the promotion procedure essentially in effect from 1977 until March 1985, the system required, at a minimum, that a candidate accumulate 53 points for promotion to grades 13 through 16 (the supervisory positions of Sergeant, Lieutenant and Captain), consisting of point grades on the Beto promotion test, his years of service, his education, and his performance, and that he pass an oral five-member ranking board interview.[9] Judge Justice found on September 30, 1991 in *Jones* that this promotion system had a disparate impact on black COs. Plaintiff's CC Ex. 3 and Ex. 4, pp. 36-38.[10] Plaintiffs' CC Ex. 3, par. 7.2, in effect from 1983-85.

While Moore, the only Plaintiff whose claims fall under this procedure, complains that the policy and procedures (Plaintiffs' Ex. 3) as applied to him were discriminatory, in fact, despite his subjective and exaggerated response to the experience, Moore did quite well under the testing, scored 40 on the Beto test and 54 points total (TR I at 154, 156),[11] above the minimum level necessary for promotion, and thus qualified for

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[9] Under this system, circuit ranking boards went from unit to unit and gererated an open and continuous list, valid for six months, of candidates for promotion from those candidates that qualified. Plaintiffs' CC Ex. 8, 9, 10, 11.

[10] An applicant for promotion could also not be on probation, either disciplinary or that which follows a new hire, promotion or demotion for six months.

Judge Justice in *Jones et al. v. Texas Department of Corrections*, C.A. No. 87-364-CA, found that the policy of promotion testing and requirement that an applicant obtain 53 points to be eligible for promotion had a disparate impact on black CO IIIs seeking to climb the ladder to a supervisory position. Here Moore qualified, and thus he does not fall into that negatively impacted category.

[11] Transcript citations refer to the transcript of the class certification hearing (#165-70).

an interview before the ranking board on this, his first, application for promotion after only ten months of employment with TDCJ. Moreover, after the interview before the ranking board, Moore was deemed qualified to proceed to be interviewed by the selection board. Moore was ranked sixth out of fourteen qualified applicants and was placed on the open and continuous list of promotable applicants, which remained in effect for six months.

At the class certification hearing, Moore objected strenuously that he was "devastated" by the experience because when he went into the screening interview before the ranking board, Warden McClure had his feet on the desk and read a hard core magazine the entire time, never looked at nor spoke to Moore, and never acknowledged Moore's presence. Such behavior does not constitute an ultimate employment action, nor apparently did it affect Moore's promotion opportunity since he was found qualified by the ranking board, which included McClure, to proceed before the promotion board. TR II at 216-17. Moore mentioned in his testimony during the class certification hearing, moreover, that Captain Cox, a black male officer, was also present at the ranking board.

Moore testified that after making the open and continuous list, he did go before an all-white promotion board at Ramsey Unit, but the same day he was informed that a white man named Phillips, who Moore considered less qualified than himself and who Moore asserted was charged with a felony for beating a handcuffed inmate, was selected. TR I at 159-62. Moore stated that Phillips performed in the position about three weeks and was then terminated because of the felony. He did not provide Phillips' full name or any supporting documentary or corroborative evidence for these assertions. On cross examination, however, Moore conceded that he did not know anything about Phillips or his qualifications or the length of time he had been with TDCJ. TR II at 218-18.

Furthermore Moore never filed a grievance[12] against either the ranking or promotion board with regard to his application for promotion to Building Lieutenant. TR II at 217. Plaintiff admitted that he never applied for another promotion because of this single experience, even though Warden Glenn at Retrieve encouraged him to do so. TR I at 192; II at 216; V at 1129-30.

TDCJ presented legitimate and persuasive reasons why Moore was not given the promotion to Building Lieutenant. There was credible testimony (James Bush, Assistant Director of Human Resources, TR I at 59-60) that although it was permissible for a CO III (a non-supervisory position) to apply for a supervisory position two or more ranks above his current rank if he was qualified, promotion was normally one step up from the current rank. See also affidavit of James Bush, instrument #112 in file, last Ex. at 3.[13] Previous Director of

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[12] TDCJ had two avenues available for grievances: an internal complaint process through the Personnel Department and an EEOC charge and investigation. TR I at 71.

[13] Bush's affidavit states,

> One of the Plaintiffs, Robert Moore, is alleging that he was discriminatorily denied promotion to the position of Lieutenant in April 1985. He had only been employed since June 4, 1984 and had not held the position of the next step in the career ladder progression of rank, prior to applying for a Lieutenant position. In order to be eligible for the position of Lieutenant, an applicant must first have been a Sergeant, or possessed previous correctional custody/law enforcement experience. Mr. Moore had only been employed with TDCJ-ID for 10 months at the time that he applied for Lieutenant, and had not applied for the position of Sergeant or had the opportunity to demonstrate by his work experience with TDCJ-ID the requisite ability to supervise. If the only experience that an applicant for the position of Lieutenant had was TDCJ-ID experience [,]

TDCJ Wayne Scott testified during the class certification hearing, TR VI at 118, that based on his experience, "it is very unlikely" that a person would be promoted from a CO III position that he had just attained to a Lieutenant's position. In the hierarchy of TDCJ, that procedure would mean promotion from CO III to Sergeant (the first supervisory step), and subsequently to Lieutenant. Moore applied for the Lieutenant position without ever having held the Sergeant position and after only ten months' employment by TDCJ with no previous law enforcement experience. This Court finds that in light of the circumstances discussed *supra*, Moore subjectively overreacted and his conclusions cannot support a claim for racial discrimination and/or abusive or hostile working environment.

Alleging unlawful retaliation, Moore also alleges that before he filed his EEOC charge on November 13, 1995 asserting the denial of the promotion to Building Lieutenant, he had never been reprimanded nor placed on probation. After he filed his charge, he alleges that retaliatory measures were taken against him. Under TDCJ policy, if an officer is placed on probation, he is not eligible for promotion. Plaintiffs' CC Ex. 12,par. 4C. Although Moore claims retaliation, the record evidences race neutral reasons, i.e., Moore's misconduct evidenced in unauthorized absences, for TDCJ's disciplinary actions and that Moore has failed to show that these reasons were pretextual and that TDCJ's punishment was racially motivated. Moore, himself testified that he first received three months probation for an unexcused absence after he requested a day off, was denied it, asked again, but did not hear back from

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it is highly unlikely that this person would go from CO III to Lieutenant in less than a year, particularly if they had never been a Sergeant at TDCJ-ID or had prior correctional custody/law enforcement experience elsewhere. On average, most employees work for TDCJ-ID at least two years before becoming a Sergeant.

the warden, so he simply did not come to work. TR I at 177-80. He argues that he had accumulated over two hundred hours of vacation and sick time accumulated at the time, but concedes that he did not use them in taking the day off. He complained of a subsequent formal reprimand and one month's probation for not coming to work the day after his twenty-fifth wedding anniversary, March 26, 1986, even though his request for that day off had previously been denied. TR I at 178, 186-87. Moore fails to show that the discipline was pretextual and unjustified.

Moore also complains that his job performance evaluations went down after he filed his EEOC charge. TDCJ presented evidence that the evaluation format was changed around that time. Moreover, Moore's last evaluation, Plaintiffs' CC Ex. 40, was done by Officer S.O. Kinney, a black officer, who was more negatively critical of Moore than his previous white evaluators. TR II at 235-36. The evidence is not sufficient to support a claim for retaliation under Title VII.

Moore's other claims of racial discrimination at Darrington are general, conclusory, and vague: assignment of blacks to the dangerous jobs at the pickets, in the showers, the wings and the tanks; "an openly racist sort of atmosphere" where"things [were] being said" (TR I at 154); exclusion of blacks from high ranking jobs; disparate punishment that was much harsher on blacks. While he globally charges the existence of a hostile work environment, in which there was "total disrespect for blacks"(e.g., TR I at 172) and unequally harsh punishment of blacks with respect to whites for the same offenses, he fails to provide any specific, personal knowledge and evidence to support them or to show that it interfered with the conditions of his employment to the point where he was unable to perform. Job assignments are not actionable adverse employment action unless they constitute a demotion, an assertion not made by Moore here. Moore explained that he did act as a substitute counselor while at Retrieve in representing inmates at disciplinary hearings and helping them to write grievances. Moore lacks standing to assert other officers' claims,

e.g., harsher and more frequent punishment of black COs for infractions, discriminatory discharges, etc., as his own. *See, e.g.*, TR I at 172 (Moore testified that he, personally, had no claims of discriminatory hiring or discharge.) He complains that supervising Lieutenant and Warden would only talk with him when others were present and that the other officers treated him differently and stayed away from him. TR I at 169-70. Such conduct, while suggesting wariness of Moore, does not constitute a hostile work environment.

The Court finds that Moore has failed to show that denial of his sole application for a promotion was pretextual or motivated by racial discrimination and certainly does not support claim by him that he was excluded from high ranking jobs because of his race. Nor has he shown that TDCJ's reasons for his subsequent disciplinary punishment were pretextual and that the sanctions were racially motivated or retaliatory.

Moore failed to produce any evidence that his working conditions were so intolerable that a reasonable person in his shoes would have felt compelled to resign to support his claim of constructive discharge. The evidence reflects that he voluntarily resigned on June 5, 1989. The Court observes that officer Kenney's negative evaluation of Moore did not issue until June 30, 1989.

Nor has Moore demonstrated the element of a racially hostile or abusive working environment.

LORENDA WASHINGTON

The claims of Plaintiff Lorenda Washington were compromised and settled following a court-ordered mediation. File Instruments #205 and 217.

Washington filed an EEOC charge on January 29, 1966, his notice of his right - to- sue within ninety days of its receipt was dated November 26, 1986.

CHESTER R. YOUNG

Chester Young's EEOC racial discrimination charge, filed on February 9, 1988, complains of denials of promotions to higher level positions, the latest on December 9, 1987 for a Maintenance Mechanic V position . Young's right to sue letter was dated March 17, 1989 and allowed his ninety days from receipt of the letter to file suit in federal court.

During the class certification hearing, Chester Young claims that he was a CO III in maintenance security at the Retrieve Unit for two and one half years, nine to twelve months by himself. TR II at 252-53. He alleges that in December 1985 two white security officers were added to the maintenance department and that Young was responsible for their retraining. TR II at 252-53. He also trained an assistant maintenance supervisor in prison security. TR II at 252-53. He complains that his job was reclassified as electrical crew, divided into three jobs that became supervisory positions, each paying a higher salary than Young had been paid and involving duties which Young had been performing all along, and that he was not given any of the three positions even though he was qualified for all,[14] allegedly because he was black. Instead, whites were given all three. *Id.* at 255. One of Young's trainees became a boiler operation supervisor and one, Van Simms, an assistant maintenance supervisor.[15] *Id.* at 256, 261-62. He further complains that when a job was posted in November 1986 for an electrical and Air Conditioning Mechanic Position at Retrieve,

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[14] Young points to his performance evaluations, Plaintiffs' Ex. 22, 23, 24, reflecting his progression from being ranked as a "good" employee to being evaluated as "excellent."

[15] During cross examination, Young conceded that he did not apply for this position because he did not know that it was open. TR III at 466. He also did not apply for Ralston's boiler maker position. TR II at 263-64.

Furthermore, at trial Young testified that Van Simms was black also.

a job he claims he had already been doing for two and one half years, he did not get the position because of his race. *Id.* at 258-59. He insisted that when he went before an all-white board, he was the only black person in the room. While no one was picked for the job at the time, it was subsequently given to a white person from outside TDCJ. He applied at the same time for the Electrical and Air Conditioning Mechanic III position at the Goree Unit. He interviewed with a board, which was also all white, and was not selected. Young, along with two white officers, was subsequently transferred back to building security. One of the whites, Officer Ralston, whom Young had trained on boilers, was then promoted to boiler supervisor. Young testified that he did not apply for the position because he had been turned down for the electrical job that he had already been doing and knew he would not get the promotion; he also alleges that Ralston had already been told that Ralston would get the supervisory position. TR II at 262-64.

In February 1987, Young accepted a job change, still at the CO III level with no pay raise, in the food service department as the security officer, but assisted the Food Service Manager with his duties throughout the year. He asserts that he was assigned later to the night shift, where he performed supervisory functions because no supervisory personnel were assigned to that shift.

In November 1987 Young applied for a posted Plumber/Pipe Fitter position at Retrieve. Although he appeared before a promotion board, a white man, Larry Nutt, was chosen for the position. Nutt's employment packet, Defendants' CC Ex. 40, reveals that Nutt was a licensed plumber in the State of Texas, had ten years of plumbing and pipe fitting experience, as well as three years of experience as a Construction Foreman IV for TDCJ, a higher position that the one he now received. Young applied in December 1987 for another Plunber/Pipe fitter position at a different Unit. He insists that he was qualified and that it involved the kind of work he was doing. He did not get that job either.

In April 5, 1988, Young became Food Service Manager I[16] at Retrieve and worked for about one year, after which he was transferred to the Central Unit. He complains that despite excellent references, he was never promoted beyond Food Service Manager I. In 1991, Young's immediate supervisor, Food Service Manager II Captain Robert Wallace, [17] left TDCJ and Young was made Acting Captain and Food Service Manager II by the warden as of February 1, 1991. Although he received certificates reflecting excellence in his performance (Plaintiffs' CC Ex. 31 and 32), when he applied for promotion to that position, he did not even make the screening board. Instead a white, Donald Drake, got the job. Young subsequently applied for other Food Service Manager II jobs in Marlin, Texas, Diball, Texas, Retrieve Unit and Jester 4 Unit. Although he was interviewed by promotion boards for all four, he did not get the positions, allegedly because of his race,

The credible and detailed testimony of Carol Blair Jones of TDCJ's Human Resources Department revealed that there are no records showing that Young ever applied for the jobs to which he claims he was denied promotion or that he lacked minimum qualifications or less qualified for than the selected candidate. TR VI at 16-27.

On February 9, 1988, Young filed an EEOC complaint alleging denial of promotion based on his race (Plaintiffs' CC Ex. #34) after he was *denied* the Mechanic Plumber/Pipe Fitter 5 position in November 1987.

After receiving his right to sue letter (Plaintiffs CC, Ex. 35), he filed this suit in which he alleges denial of promotions based on race, discriminatory job assignments, mainly to the

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[16] Food service Manager positions are not security positions, indeed, the Court notes that all the promotions that Young claims he was denied were noncorrectional positions, while the positive evaluations he cites deal with his work as a security officer.

[17] At trial, Young identified Wallace as African American.

pickets and wings, unequal housing assignments of whites to the new dormitory and blacks to the run-down, old dormitory, subjection to racial slurs from officers and from graffiti carvings on the Center Hall desk and on the outside picket wall.

Young's claims after the denial of the Mechanic Plumber/Pipe Fitter job in November 1987 were not presented to the EEOC and are not properly before this Court. Moreover, of his earlier claims, only denials of his for promotion to Boiler Supervisor in October 1987 and for Electrician in October 1987 are timely within the one-hundred-eighty-day period prior to the filing of his EEOC claim.

Young's credibility was undermined at the class certification hearing by TDCJ's evidence showing significant disparities and misrepresentations among Young's applications for employment and promotion regarding dates when he allegedly worked for other employers and the years and nature[18] of his work experience, even in the presence of a clause stating that falsification constitutes grounds for refusing or terminating employment. *See e.g.*., TR III at 476-92; Plaintiffs' CC Ex. 38, 34. On cross examination he conceded that he had no formal training in or licenses for maintenance, plumbing, or electrical work. TR III at 450-52. TDCJ also presented evidence of his extremely poor showing in response to technical questions at oral interviews for these specialized jobs, as the reason why he was not promoted to them. TR III at 460-64, 472-73; 474. File Instrument #172, Appendix B, Young. TDCJ presented evidence that for the Plumber/Pipe Fitter position, Young got the lowest score before the screening board, a "25," whereas Larry Nutt, who was awarded the job, scored a "68." TR III at 474. Moreover, Young admitted on cross examination that he

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[18] When Young was performing as a correctional officer in a security position, he claimed he was in food service or maintenance or electrical work. *See, e.g.*, TR III at 456-59. TDCJ points to Plaintiffs' Ex. CC 28, Young's performance evaluation to demonstrate that his positive evaluations were for security work. TR III at 465-66.

did not know much about the whites whom he identified as getting jobs for which he had applied, Officers Van Simms and Ralston, and Larry Nutt. TR III at 467, 473.

The Court finds that Young has failed to show that TDCJ's race-neutral reasons for not promoting him were pretextual and that its decisions were actually motivated by race discrimination.

Young has also failed to show severe or adverse harassment in the workplace that altered the conditions of his employment, interfered with his work performance, and denied him an equal opportunity to succeed in the workplace.

LINDA BAKER

Linda Baker's EEOC charge, filed on November 20, 1987, complains that she was discharged on October 12, 1987 from the position of CO III at the Retrieve Unit, allegedly for "gross negligence and substandard duty performance," but according to Baker, her termination was in retaliation for her opposition to and participation in this proceeding.

Although at trial Baker testified about numerous incidents and procedures at Retrieve that she claimed reflected racial discrimination between 1984 and 1985, she failed to exhaust these claims by filing a timely EEOC charge.

Baker's employment records (Plaintiffs' CC Ex. 40 or Appendix B to Defendants' Second Supplemental Motion to Dismiss and First Supplemental Motion for Summary Judgment at 23-40 (file instrument #172)) demonstrate that she was discharged because she failed in her duties as a CO on picket number 1, thereby allowing four inmates to escape. She admitted that she failed to observe the four inmates leaving until after they had scaled the perimeter fence of the general population recreation yard and that she failed to fire her weapon to prevent the escape, although the agency policy requires that "firearms be used for the prevention of escapes and for the protection of life and property" and that "officers who fail to use their assigned weapons to prevent such an escape have failed to

discharge his/her [*sic*] primary responsibility." *Id.*, file instrument # 172, Appendix B, Baker at 30.[19] Warden Crawford also recommended the dismissal of a white CO, Robert Washburn, who was also assigned to a nearby picket at the time of the escape. *Id.* at 40.

Furthermore, her record is replete with documents demonstrating that had a history of disciplinary actions including for unexcused absences and tardiness, with numerous

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[19] In Building Major D.L. Stacks' IOC to the Employee Review Committee on September 25, 1987, he highlights the Major Use of Force Plan which provides,

> Whenever use of firearms is immediately necessary to prevent an escape, the officer must, if practical, shout for the inmates to halt, and if that fails, fire a warning shot. The Officer must fire on the inmate only when it appears probable that the offender will elude immediate efforts for recapture.

Stacks also cites the perimeter picket post orders pertaining to escapes: "If the officer at this point believes there is no physical force short of deadly force available or likely to be effective to stop the escaping inmate, and the inmate is attempting to climb a perimeter fence, he shall fire his weapon at the inmate."

Finally, Stack quotes Rule 5.7 of the Employees Rules and Regulations (rev. ed, 1978):

> IT IS THE POLICY OF THE TEXAS DEPARTMENT OF CORRECTIONS THAT FIREARMS BE USED FOR PREVENTION OF ESCAPES AND FOR THE PROTECTION OF LIFE AND PROPERTY. WHENEVER POSSIBLE, SHOTS FIRED AT THE INMATES SHOULD BE DIRECTED TO DISABLE RATHER THAN KILL. IT SHOULD BE THOROUGHLY UNDERSTOOD THAT WHEN A ESCAPE IS CONSUMMATED THE DEPARTMENT HAS FAILED IN ITS PRIMARY OBLIGATION. THE OFFICERS WHO FAIL TO USE THEIR ASSIGNED WEAPONS TO PREVENT SUCH ESCAPES HAVE FAILED TO DISCHARGE HIS (*sic*) PRIMARY RESPONSIBILITY. . . . ESCAPE MUST BE PREVENTED.

counseling, and "marginal" job performance evaluations. *Id.* at 1-22.

Baker has failed to show that TDCJ's reason for her dismissal was pretextual and that race discrimination was the actual motivation. She has also failed to demonstrate a racially abusive work environment.

ROYAL R. ASHTON

Royal R. Ashton filed an EEOC charge on January 6, 1986 challenging a November 6, 1985 racially discriminatory written reprimand, denial of pay increase, and six months' probation for insubordinate attitude in violation of work rules 1.6, 1.7, 1.37.4, and 1.37.5.

Ashton insists that the discipline he received on November 6, 1985 was unfair and was in retaliation for his participation in an "officer's rebellion" on behalf of black officers.[20] He also complains that in November 1985 at the Retrieve Unit, he was denied a promotion from a position as a security guard to the rank of Corporal, despite the fact that CO II non-blacks have been awarded these positions without completing their probationary period of employment. He further challenges a poor evaluation of his performance since he went

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[20] More specifically, Royal R. Ashton complains that his white Shift Lieutenant, L.W. Foster, placed Ashton and two other black officers on probation, which in turn resulted in his ineligibility for promotion from guard to corporal (and an attendant pay increase), branded him as a "black troublemaker," and subjected him to intense harassment intended to force him to resign or be terminated. The reason for Foster's allegedly racially motivated actions was Ashton's presence at a shift meeting, later termed "the officer's rebellion," where black Correctional Officer ("CO") M.C. Fontenot challenged Foster's continual assignment of Fontenot to an undesirable work location on picket number 3, instead of rotating him in accordance with TDCJ policy. Officer Fontenot and another officer were terminated, while Aston and two other black officers, who attempted to act as witnesses of the event, were placed on probation.

under the supervision of Caucasian Lieutenant Foster, given to him on January 2, 1986.

In a second charge filed on April 25, 1986, he complains of retaliation for filing his earlier charge: he states he was written up eight times, had to appear before the Unit Disciplinary Committee three times for informal reprimand, was suspended for ten days, put on probation, and discharged on April 24, 1986 for unexcused absences. He further challenges the following write-ups he received for violations of the TDC Employees Manual of Rules and Regulations: January 28, 1986, job performance and dress code; February 14, 1986, insubordination; February 15, 1986, poor attitude; March 18, 1986, failure to report to work or properly notify a shift supervisor; April 17, 1986, unlawful order; April 22, 1986, unexcused absenteeism, April 23, 1986, willful violation of statutory authority, court order; and April 23, 1986, order, rules, or policy. His right to sue letter was dated March 6, 1987 and allowed ninety days from its receipt to file a federal suit.

Ashton's letter advising that he was entitled to institute a civil action in federal court within ninety days of its receipt was dated March 6, 1987. As with Plaintiff Moore, the claims of Ashton are time-barred since this suit was filed more than ninety days after the denial of the *Moore* Plaintiffs' motion to intervene in *Cirilo*, and since Ashton had also previously received his right-to-sue letter.

Even if the claims had been timely filed, TDCJ presents evidence that the "Corporal" rank is simply a classification of correctional officer, a different job function within the same class, that involves no new employment relationship or loss of pay to violate pre-1991 amendment § 1981. Affidavit of TDCJ's Director of Personnel, James Bush (file instrument #112, last exhibit).

Moreover, the evidence in the record clearly demonstrates that Royal B. Ashton was chronically absent without excuse or permission. Between February and November 1985, on at least nine separate occasions he was late

or absent from work, despite official counseling regarding his unapproved tardiness and absenteeism. Plaintiffs' CC Ex. 40 (also Appendix B to Defendants' Second Supplemental Motion to Dismiss and First Supplemental Motion for Summary Judgment (file instrument #172).[21] He was placed on

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[21] In Ashton's record are the following documents. First, an IOC, dated February 2, 1895, from Officer G. Willingham to Lieutenant Perez noting Ashton's failure to report for the 2 p.m. - 10:00 a.m. without prior notice. It states that when Willingham called Ashton at the latter's home, Ashton told him that his car had "blown up" and that he did not have transportation. Ashton did report three and one half hours late. Next is an IOC from Lieutenant Mask to Major Pelz, dated March 23, 1985 stating that he did not report for work on March 23, 1985 and did not call his supervisors four hours in advance of the start of his shift as he had been told to do. He was counselled after this incident. That same day Sgt. Martinez wrote an IOC to Major Pelz stating that Ashton called at 5:30 p.m. (3 1/2 hours after his shift began) and said he had had car trouble and was stranded in Santa Fe. Next, as evidenced by an April 7, 1985 IOC from Lieutenant Tate to Warden Price, Major Pelz, Captain DeLeon, and Lieutenant Perez, on 4/7/85 Ashton did not report for his shift and did not call in to notify the officials of his absence. When the Shift Lieutenant called Ashton's home, he was told Ashton was not there. The IOC states that the same thing had occurred on 4/6/85. There is a handwritten indication on the IOC by Major Pelz that Ashton was counselled on 4/8/85 and an IOC dated 4/8/85 that states that Ashton said he was having family problems, admitted being wrong, and promised not to repeat his conduct. An IOC dated May 13, 1985 reports that Ashton was twenty minutes late to work and claimed he had overslept because the electricity had gone off in the dormitory and his alarm clock rang late. An IOC dated June 2, 1984 reports another lateness. An IOC dated June 9, 1985 from Lieutenant Tate to Major Pelz again reports tardiness and additional counselling. An IOC dated October 25, 1985 states that Ashton called in at 5:30 a.m. to report that his car had broken down, that Officer Fontenot was with him, and that he would be forty-five to fifty minutes late. At 9:30 a.m. the two officers still had not shown up or called in violation of TDC Rule 1.6. Lieutenant Tate advised having Ashton appear before the Unit Disciplinary Committee. An IOC dated October 30, 1984 from Lieutenant Foster to Warden Price, Major Pelz, and Captain Nichols states that Ashton said during investigation of his last absence on October 25 that it was cold and

disciplinary probation on March 26, 1986 for twelve months and suspended, without pay, for fifteen days because he failed to report to work on March 18, 1986. The suspension began on March 27, 1986, but James E. Riley, Deputy Director of Operations for the Southern Region, ordered that Ashton be reinstated on April 7, 1986, while an investigation of the claims against him proceeded. His punishment was subsequently reduced to seven days of suspension, which he had already served. Nevertheless on April 19-20, 1986, Ashton again failed to come to work. Warden Crawford recommended that Ashton

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he was not able to find transportation to work. An IOC dated October 30, 1985 reports that Ashton was later and claimed that having other officers riding with him slowed him down. An IOC dated November 2, 1985 from Captain Nichols to Warden Price directs Ashton to appear before a review board on November 6, 1985 for specified rule violations. The disciplinary committee met on that day and unanimously recommended a written reprimand and six months' probation. Another IOC dated November 9, 1985 from Lieutenant Mack to Major Pelz states that Ashton called, again not in compliance with the rule requiring notice four hours or more prior to his shift, to say he could not come to work because he did not have a baby sitter. Ashton had already been given off November 7-8, 1985 to take care of the problem. A letter of instruction, dated November 27, 1985, from Major Pelz to Ashton summarizes his record of tardiness and absences and admonishes him to be at work and that lack of transportation would no longer be accepted as an excuse. Ashton received a formal written reprimand on March 18, 1986 from Warden Crawford indicating that he was being placed on disciplinary probation for one year and suspended without pay for fifteen work days. On March 18, 1986 and IOC to the Retrieve Employee Review Board from Captain Nichols states that Ashton failed to report for duty on March 18, 1986, that the officers had traced him down and he said he had a doctor's appointment, scheduled several days earlier, for that day, but had not informed Nichols because he was working way out on a picket. In light of his violation of the rules again, Nichols ordered him to report to the review board on March 26, 1986. He served a seven day suspension without pay and was given a formal reprimand dated April 24, 1986 by Warden Crawford. On April 22, 1986 Captain DeLeon wrote an IOC to the Employee Review Committee about additional absences on April 19 and 20th and about Ashton's repeated failure to notify officials.

be dismissed. On April 30, 1986 Ashton was placed on leave without pay, pending the result of that recommendation. The decision was once more a reduction in the disciplinary, and Ashton was reinstated on May 28, 1986. He was then transferred from Retrieve to the Central Unit, where he failed to report for work from June 23-29, 1986. Ashton resigned on June 30, 1986. His IOC of the same date to Warden Lepher Jenkins simply states, "I hereby submit my resignation from the Texas Department of Corrections effective 30 June 1986." Plaintiffs' CC Ex. 40.

Ashton fails to show that his suspensions were not, as TDCJ asserts, for absenteeism but were racially motivated. Nor has he demonstrated the elements of constructive discharge or hostile work environment.

DAVID HOLLINS

David Hollins' EEOC racial discrimination charge, filed on July 6, 1986, asserts that since September 1985 at the Retrieve Unit, Hollins was harassed daily about performance of his duties, such as signing in and out during his break, and received a written reprimand for allegedly violating work rule 1.35.[22] He complains of a lowered evaluation of his job performance ("marginal") by Lieutenant Foster, a Caucasian, which he received January , 1986, and of denial of promotion to the rank of Corporal in November 1985. Such claims appear not to have been timely presented to the EEOC and most, if not all, are not ultimate adverse employment actions actionable under Title VII.[23] His right to sue letter issued on March 6,

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[22] Among the complaints made by Hollins are that non-black officers stared at him, he was labeled a "trouble maker" and counseled about his "bad attitude", and he was sent home for not shaving. Such matters are not adverse employment actions as defined in regard to Title VII liability.

[23] As note in regard to Ashton, TDCJ presents evidence that the "Corporal" rank is simply a classification of correctional officer, a different

1987, providing ninety days from its receipt to file suit. Thus he failed to file suit timely and his claims are barred.

Hollins' employment records (Plaintiffs' CC-Ex 40 (also Appendix B to Defendants' Second Supplemental Motion to Dismiss and First Supplemental Motion for Summary Judgment (file instrument #172), Hollins) reveal numerous disciplinary actions taken against him for misconduct. There are written reprimands for unexcused absences: On October 23, 1985 Hollins received a written reprimand for failing to appear for work on September 20, 1985 and giving no prior notice; he was cited for absence without excuse from November 22-25, 1985[24]; on February 13, 1986 Hollins called to inform TDCJ he would be sick for several days, yet he was seen with other officers near the Unit the next day; and he was absent without leave on April 2, 1986. Appendix B, Hollins at 3, 7, 11, 12-13. On September 25, 1985 he was cited by Major Pelz for insubordination, including abusive language and disrespectful attitude to Lieutenant Foster and to Pelz. In June 1986, when he appeared in a T.G.Y. store without a uniform shirt, Hollins was verbally reprimanded for wearing a partial uniform in public and off duty hours in violation of the agency's policy on May 15, 1986. *Id.*

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job function within the same class, that involves no new employment relationship or loss of pay to violate pre-1991 amendment § 1981. Affidavit of TDCJ's Director of Personnel, James Bush (file instrument #112, last exhibit). Furthermore, during the bench trial, Hollins testified that after he was not promoted to Corporal, he never applied for a Sergeant's position because he "he knew deep in his heart that they would not promote him." Subjective allegations will not support a claim for racial discrimination. As with Moore, he gave up after a single attempt. He remains a CO III.

[24] One IOC from Lieutenant Foster to Warden Crawford, dated November 26, 1985, points out that Hollins submitted an Activity Schedule from an Emergency Room at St. Mary's Hospital stating that he should be off work on these days. When Foster checked on it, he was told that the hospital had no record of Hollins' treatment on these four days. Appendix B, Hollins at 8-11.

at 14-17. Another reprimand and three months' probation were imposed on Hollins on April 26, 1990 for refusing to follow an order to work a picket for a second day and failing to return to his post. *Id.* at 18-29. He was reprimanded again on June 26, 1990 and given ten months' probation for failing to appear for work and failing to notify anyone on June 13, 14, and 17, 1990. *Id.* at 30-34.

Moreover the evaluations in Hollins' file indicate that during the relevant time period Hollins was overall either a marginal or satisfactory employee, and those dated December 18, 1989 and December 15, 1990 chronicle Hollins' frequent abuse of sick leave.

Nevertheless Hollins is still employed by TDCJ, now as a CO III at the prison hospital in Galveston, Texas, but he has not raised any claims of continued harassment or discrimination and his performance evaluations have improved. File instrument # 172, Appendix B, Hollins at 45-49.

Hollins has failed to show that his claims are timely, that TDCJ's reasons for its disciplinary actions were pretextual and that TDCJ was actually motivated by racial discrimination, or that he was subjected to a racially discriminatory hostile environment.

RANDALL BYRD

On November 13, 1985, Randall Byrd filed an EEOC charge stating that on November 7, 1985 he was suspended from his position as CO at the Retrieve Unit, allegedly for violating unspecified TDC rules.

The employment records of Byrd reflect that he was verbally reprimanded on August 22, 1985 for leaving a steel milk pitcher in the cell of an inmate with psychological problems and was suspended for two weeks without pay on November 6,

1985 for an inmate count sheet error.[25] Plaintiffs' CC Ex. 40 (also Appendix B to Defendants' Second Supplemental Motion to Dismiss and First Supplemental Motion for Summary Judgment (file instrument #172), Byrd at 4-5, 7, 8-11. On December 4, 1985 a disciplinary hearing was held, but Byrd failed to appear, and termination for insubordination was recommended. On December 16, 1985 he was terminated, according to Defendants, for insubordination and continuing violation of TDCJ policies. *Id.* at 21-23.

Byrd filed a second EEOC charge on December 5, 1985 claiming that he was discharged that same day in retaliation for filing the previous charge and because of his race. Specifically, Byrd also states that on December 4, 1985 he was accused of insubordination and later discharged because he used a derogatory statement about Orozco in a November 4, 1985 meeting, for which he insists he was unjustly suspended from November 7, 1985 as well as ultimately discharged. His right to sue letter, allowing ninety days from receipt to file suit, was dated March 6, 1987. Thus his claims are also time-barred.

Byrd fails to prove that TDCJ's reason for discharging him was pretextual or that his termination was racially motivated. He shows no causal link between his EEOC charge and his discharge to support a claim for retaliation. He also fails to demonstrate a racially hostile working environment.

LEON BRICE

Leon Brice filed an EEOC charge on June 5, 1986

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[25] Specifically Byrd's supervisor, Lieutenant Aristeo Orozco, reported Byrd for not doing a required inmate count, but instead copying a count report done earlier the same day by another officer. Orozco further reported that when he told Byrd that his disciplinary hearing would be held on November 6, 1985, Byrd said he would not come because it was his day off. Orozco and others stated that Byrd also responded, "You're the son of a bitch who instigated all of this shit." File instrument #172, Appendix B, Byrd at 12-15.

asserting racially discriminatory discharge on November 18, 1985 from his position as a CO, allegedly for "traffic and trading" with an inmate. His right to sue letter was dated March 6, 1987.

This claim is barred by Brice's failure to timely exhaust administrative remedies under Title VII.

Even if it were not, Plaintiff's employment records (Plaintiffs' CC Ex. #40 or Appendix B to Defendants' Second Supplemental Motion to Dismiss and First Supplemental Motion for Summary Judgment (file instrument #172), Brice, at 1-4, reflect that on November 16, 1985, Brice asked another CO to give a couple of packs of cigarettes to an inmate in administrative segregation because Brice had lost a bet that he had made with the inmate over a football game. The records, at 4-6, also reflect when Brice could not pay his debt, the inmate and Brice had an altercation, observed by Sergeant Michael Mendek, who saw the inmate spit on Brice. Furthermore, Brice did not report the incident. Ward J. A. Shaw recommended that Brice be terminated based in the agency's policy forbidding trafficking and trading with inmates for security reasons. Brice was discharged on November 28, 1985.

Brice has failed to show that TDCJ's reasons for his discharge were pretextual or that his termination was motivated by racial discrimination. Nor did he present sufficient evidence to establish the existence of a racially hostile work environment.

RONNIE HUDNALL

On June 20, 1987, Hudnall filed a discrimination charge with the EEOC and the Texas Commission of Human Rights[26]

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[26] Appendix B to Defendants' Second Supplemental Motion to Dismiss and First Supplemental Motion for Summary Judgment (file instrument #172), Hudnall at 1-4.

complaining of a racially discriminatory strip and body cavity[27] search on April 22, 1987 of Hudnall by three white and one Hispanic officer at the Retrieve Unit for allegedly bringing contraband into the unit. The search was videotaped. Defendants' CC. Ex. 47. When they found no contraband on his person, they searched his car and dormitory room. Warden Glenn subsequently informed Hudnall that an informant had told prison authorities that Hudnall was bringing narcotics into the prison. Appendix B to Defendants' Second Supplemental Motion to Dismiss and First Supplemental Motion for Summary Judgment (file instrument #172), Hudnall at 1-7.

TDCJ has demonstrated that Hudnall was strip searched because an informing co-employee officer overheard him conversing with an inmate about bringing the inmate some contraband. TR V at 132-33; file instrument #172, Appendix B, Hudnall at 1-8. *See also* Testimony of Warden Lon Glenn at class certification hearing, TR V at 1131-33. It has further demonstrated that strip searches are customary where information regarding introduction of contraband into the prison is received for obvious security reasons. *See, e.g.*, the credible testimony of Captain DeLeon, TR V at 64-65, 79-80, and of Sergeant Jesse D. Robinson, a black officer. *id.* at 88 (when they begin work for TDCJ, employees sign a written contract allowing search of person and car). Hudnall has failed to show TDCJ's reason for the search was pretextual and that it was racially motivated.

Hudnall claims that after he filed the EEOC charge, Regional Director Michael Moore instituted an "administrative transfer" of Hudnall from Retrieve Unit to Central Unit. Hudnall claims that he was informed by a Lieutenant at Retrieve on July 27, 1987 that he "was no longer the property of the Retrieve Unit" and that he was to report to Central on August

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[27] The evidence it the record, including the videotape of the search (Defendants' CC Ex. 47) reveals that there was no cavity search.

1, 1987. When he reported to work at Central, he was called to the Warden's office and Michael Moore reprimanded him for failing to report for work at Retrieve from July 28- August 1, 1987. Plaintiffs' CC Ex. 69. It was the first time Hudnall was reprimanded during his employment.

After that incident, Hudnall charges, he was reprimanded and was put on probation for sixty days for being late to work because of car trouble. He argues the punishment was disproportionate to the infraction and to what was normally given for such a violation. On June 9, 1988 he filed a second EEOC charge complaining of being placed on sixty days' probation on May 19, 1988 by Warden Jenkins, allegedly for unexcused absenteeism, but, according to Hudnall, in retaliation for filing the earlier charge. On April 19, 1990, he filed a third charge complaining of retaliation for filing the previous two charges with the EEOC.

The Court finds that there was justification for the probation punishment, as evidenced by his record of chronic absenteeism, and that Hudnall has failed to show that such justification was pretextual and that the punishment was motivated by racial discrimination. Warden Lepher Jenkins, who imposed the probation, is, himself, black and testified during the class certification hearing about Hudnall's persistent unexcused absenteeism, which ultimately led to his termination. TR V at 14-27, 48-49, 55-58. Moreover, that sixty days' probation was given after numerous previous incidents of unexcused absenteeism. Plaintiffs' Ex. #70; Appendix B to Defendants' Second Supplemental Motion to Dismiss and First Supplemental Motion for Summary Judgment (file instrument #172), Hudnall at 9-21, 24-30.

Tardiness and absenteeism continue into the next year. Appendix B to Defendants' Second Supplemental Motion to Dismiss and First Supplemental Motion for Summary Judgment (file instrument #172), Hudnall at 33-37, 39-40. In December 1989, Hudnall was absent again. *Id.* at 41-42. He contends that he failed to inform his supervisor because he was too sick to call

him. On January 15, 1990 he was terminated for excessive absenteeism. *Id.* at 43-51.

On April 19, 1990, Hudnall filed a third charge complaining of his reprimand and suspension on December 12, 1989 and discharge on January 15, 1990, again, he claims, in retaliation for filing his previous charges.

TDCJ has substantial documentation reflecting that Hudnall was reprimanded and ultimately terminated for chronic unexcused absenteeism. Hudnall fails to show that the reason is pretextual or that his disciplinary actions were racially motivated.

ANNIE M. KELLY

On May 24, 1990, Annie M. Kelly filed a racial discrimination charge complaining of denial of a promotion to the specific postition of Administrative Technician III (Unit Classification Case Manager) at the Wynne Unit around April 20, 1990 because of her race. She has not administratively exhausted any of her other claims.

Because of the 180-day statute of limitations for filing an EEOC charge, Kelly's claims are limited to her nonpromotions from December 24, 1989 to August 8, 1989 and any related claim that might reasonably be expected to grow out of the charge during the EEOC's investigation. Her right to sue letter was issued by the EEOC on September 24, 1992.

Annie Kelly was added as a Plaintiff to this suit through the fourth amended complaint (file instrument #101) after the Court granted leave for the amended pleading to be filed (file instrument #100).

Also complaining at the class certification hearing of repeated denials of requests for promotion[28] and years of

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[28] Defendants' CC Ex. 37 lists Annie Kelly's job ratings for her requested promotions. Of those promotions sought, all to non correctional jobs, only the one noted is within the time limits and express provision of her EEOC charge, her April 1990, Administrative Tech III application.

experience at TDCJ. Kelly points out that she has a college degree and excellent evaluations. Nevertheless she conceded that she had failed to include in her promotion applications significant information about her specific qualifications for the positions she sought, e.g. Inmate Classification Case Manager and Administrative Technician III or IV or a promotion to the unit personnel office, and she agreed that it was not unreasonable that the promotion board would not consider information that she failed to present to the board. TR IV at 153, 160, 163. *See also* TR IV at 118-20 (application packet for Administrative Technician II -- Correctional Counselor II at Ellis or Wynne Units not complete because did not have current time sheet attached). She also testified that she did not indicate on her application that she had recruitment experience, a minimum requirement, when she applied for the position of Personnel Officer I in March 1989. TR IV at 153. James Hamilton, a white male with three years of recruitment experience, got the job. She also failed to include her mailroom experience on her application for Administrative Technician--Mail System Panel Coordinator in May 1989. TR IV at 160. She did not submit the proper application for the job of Correctional Counselor in September 1989. The white male who got the position, Allen Ueckert had thirty-six months' of experience assisting a mailroom supervisor. In April 1990, as her one exhausted claim, she applied for the job of Inmate Classification Case Manager, but she testified that she did not indicate on her application that she had client case management experience and she lacked a background in human resources. TR IV at 163-65. Donna Clark, the white woman who got the position, had a college degree in social work and had handled 250 cases as an intern at the Wynne Unit for a semester. TR IV at 163; Defendants' Ex. 36. When a similar job opened and Kelly applied, Theresa Moya, who was given the position, also had direct case manager experience and made a lateral transfer from her current position. TR IV at 166. Another position that Kelly sought in October 1990 was as an Administrative

Technician IV--RDC Sociologist. Kelly admitted that she lacked direct experience as an inmate interviewer, while the man who was given the job, Raymond McFarland, had five years of such experience with the RDC Committee. TR IV at 167; Defendants' Ex. 36. When Kelly applied for the Administrative Technician IV--RIO Assessment Specialist position around the same time, the promotion board ranked her eighth out of fourteen applicants and fourteenth out of the forty-one screened applicants. Those sselected had experience that she lacked. Sherrie Barrett had six years of experience as a Classification Case Manager, Linda Crawford had three and one half years as a Classification Case Manager, and Nancy Moore had six years as a Classification Case Manager. Charles Reagle was given the job at Ellis II, which was a lateral transfer from the same job he had at another unit. TR IV at 168-69. Also at the class certification hearing, Carol Blair Jones, Defendants' expert regarding the promotion policy and procedures at TDCJ, credibly testified that Kelly was not the top candidate for any of the claimed promotions. TR VI at 8-15; Defendants' CC Ex. 37. The Court finds that Kelly has not shown that the differences between her and the successful candidates were so favorable to Kelly that reasonable persons of impartial judgment would all conclude that Kelly was clearly better qualified than those awarded the jobs.

Defendants brought out that Kelly was transferred to Pardons and Paroles, at the time a separate agency from TDCJ, in December 1990 and given a promotion. TR IV at 1-83. Since then, she has been promoted and given pay raises, and now works in a position in pay group 14, step 2, three pay grades above her salary grade as a CO. They persuasively argue that she has not been subjected to race discrimination in violation of Title VII. TR IV at 183.

She also claims that because she complained about racial jokes and derogatory remarks by a white supervisor and because she aided other black officers in seeking promotions and filing grievances, she was assigned to less desirable duties. These

grievances were also not stated in her EEOC charge and have not been exhausted. Regarding the alleged racial comments, see the discussion under GENERALLY.

CHRISTOPHER LATSON

In his EEOC charge of May 22, 1987, Latson complains of continuing racial harassment since February 24, 1986. He alleges numerous denials of requested days off and transfer from first to second shift, having to bring a doctor's statement with a receipt for a visit on his regular day off, having his job threatened, denial of requested transfers to other units, the last in February 1987, and racist remarks (i.e., that he was called "Nigger" on several occasions). Latson fails to show that any of the transfers, denied or made, was a demotion.

A second charge, filed on March 2, 1988, asserts retaliation (in being given a verbal warning by his supervisors for failing to call in from Picket 3 every thirty minutes), intimidation, and harassment) for his filing of the previous charge.[29]

Latson did not file EEOC charges that timely and expressly mentioned either a fourteen-day suspension in February 1986 for making an unauthorized stop during an ambulance run or regarding his termination in February 1988, both discrete events that should have triggered his awareness of the need to file a complaint.

At the class certification hearing, TR III at 513-18, Christopher Latson complained generally of racial discrimination in the absence of blacks in the higher, supervisory CO ranks, less desirable and more dangerous job assignments, lack of job rotation, harsher discipline, denial of requests for transfers and days off, and racial slurs by other white officers. He also claimed that he was prevented from obtaining information about position openings and their requirements, *id.* at 518-19, but not

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[29] Latson intervened in this action on 7/26/99 (file instrument #7).

from seeking a promotion. He asserted that in September 1985 he was disciplined for associating with bad company along with black Officer Duncan and for leaving his post even though they had been properly relieved from duty and even though Duncan had been verbally abused just before by an Hispanic officer in front of white officers in the officers' dining hall. Latson maintained that he was also disciplined at that time for associating with Wade Brooks, a black CO who had authored a petition and spearheaded a drive complaining of the treatment of black officers and working conditions at the Clemens Unit. Having never been raised in a timely EEOC charge, these claims are barred.

During the class certification hearing Latson further objected to being disciplined to the same extent as Officer Romero (a fourteen-day suspension without pay and six months' probation) after they went out on an ambulance run and made an unauthorized bathroom stop at Romero's apartment on February 17, 1986 while they had an inmate in their custody. Latson argues that he should have received a lesser punishment since he was only a CO II on probation and had told his supervisor that he was accordingly not allowed to go on the run, that he was unfamiliar with the procedures for the job, and that he told the truth about what they had done after they returned from the run. He further asserts that he was not allowed to apply for promotion while he was on suspension, but that Romero received a promotion during this time. Latson did not file an EEOC charge regarding this suspension for this incident.

Latson also complained that he, unlike white officers, was required to bring a note stating that he visited the dentist when he did so on a regularly scheduled day off. He further objects that in February 1987, after he had enrolled in night school, his shift was changed, so he was forced to drop out of college for that semester. None of these claims is cognizable under Title VII.

Even if the ambulance suspension claim were not time-barred and had been exhausted, on cross examination during the

class certification hearing, Latson admitted that Romero's "promotion" was to a job as substitute counsel[30] to inmates in their disciplinary proceedings, and that it was not upward to a Sergeant's position, but one that a CO not on probation would handle. Latson conceded that he did not know if the pay was any different or that there was any step or grade increase under the Texas State Classification Act. TR III at 540-42. Latson does not present sufficient evidence to demonstrate that Romero received a true promotion.

The evidence shows that the ambulance run occurred in February 1986. Latson, who failed to file a EEOC charge within 180 days of his disciplinary action, but finally did so on May 22, 1987 alleging harassment and retaliation, has a time-barred claim.

Moreover, despite his complaints that he was not able to apply for promotion while he was on suspension, Latson, who was a CO II at the time of the run, was nevertheless promoted to CO III within a month on March 1, 1986.[31] TR III at 545.

Latson filed a second charge of discrimination (Plaintiffs' CC Ex. 60) on March 2, 1988, alleging retaliation for filing the first. He claims that he was harassed, assigned to less desirable duty posts, and was called to the warden's office for filing the charge of discrimination. Significantly, however, he did admit that things "did not exactly get worse after he filed the charge, "that" they basically stayed about the same." TR III at 533. Such an admission undermines his claim of retaliation.

TDCJ terminated Latson in February 1988, giving as the reason a failure to comply with sick leave procedure. He asserts that on June 19, 1987 he was injured in the inmates' dining hall

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[30] The same job was held by Robert Moore, who clearly did not view it as a promotion from his CO III rank.

[31] Progression from CO I to CO II to CO III is automatic if performance is satisfactory and the time requirements of employment are satisfied. TR I at 56.

while breaking up a fight between two prisoners. After a period of sick leave, he was approved for light duty and returned. He complains that he was assigned the picket, the outside tower, and was required to climb it, not to his mind "light duty." So he had to leave work again. He was absent again because he aggravated his back injury, but maintains that he provided documentation supporting his claim, although he presented no such documentary evidence. He was terminated in February 1988 for failing to return from disability leave and failing to provide medical documentation of a need for extended disability, as mandated by the agency's personnel policy, as evidenced by documents submitted by TDCJ. File Instrument #172, Appendix B, Latson at 9-24.[32] No EEOC charge contesting this discrete event was filed by Latson, nor has Latson demonstrated that TDCJ's reason for his discharge was pretextual and actually motivated by race discrimination.

As with Moore, Latson also fails to show that TDCJ's reasons for his discipline were a pretext and racially motivated. During the ambulance run, when Romero and Latson had a convicted, incarcerated felon in the ambulance, Romero and Latson stopped off at Romero's apartment. Common sense

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[32] TDCJ documents show that Latson returned to work on February 9, 1988, after being absent since July 1987 on workers' compensation. He then failed to report for work on February 13, 1988 and informed his supervisor that he had a doctor's excuse not to return to work for an undetermined period of time. In a letter dated February 17, 1988, TDCJ informed Latson that he was being placed on medical leave without pay, effective February 13, 1988, because his sick leave was exhausted, and ordered Latson to present documentation of his newly claimed disability within ten days of receipt of the letter. Latson failed to comply. A letter informing him of his termination was sent on March 7, 1988. File Instrument #172, Appendix B, Latson at 24, 22-23.

The Court did not find credible Latson's testimony at trial that he received a doctor's statement the day after he got TDC's February 17th letter, that he tried to schedule a meeting with the warden but the warden would not see him, and that he does not know what the doctor's report said because he did not read it. He presented no such claimed report.

indicates such negligence was improper and dangerous, even if Latson did not know the formal procedures and rules.

Latson testified on cross examination that he was written up for refusing to call in from the picket every thirty minutes, but argues there was no rule at the time requiring a CO to do so. Nevertheless, he admits that he was given instructions to do so by a supervisor, but disobeyed. TR III at 548-49. TDCJ presents evidence that the rule was posted at the picket and that Latson was so informed at the time. File Instrument #172, Appendix B, Latson at 25-29.

Latson's complaints about the note required of him from the dentist, job assignments and shift change are not ultimate employment decisions cognizable under Title VII. Furthermore, he conceded that he never applied for a promotion, because he was not encouraged to and because in light of the "way things were done around here," he knew his chances of getting a promotion "were slim to none." TR III at 529-30 If he did not apply, as is required, he has no grounds to assert a claim for denial of promotion.

Latson has failed to show that his suspension and termination were pretextual and that they were actually motivated by racial discrimination or retaliation. He also has not demonstrated the elements of a racially hostile work environment.

WADE BROOKS

On October 30, 1987, Wade Brooks filed an EEOC charge complaining of his suspension without pay on October 2, 1987 for sixteen days (allegedly for having unloaded weapons) and his subsequent allegedly race-based termination on October 26, 1987 from the position of CO III on October 26, 1987. He filed a second EEOC charge on December 27, 1989 contesting TDCJ's refusal to [re]hire him because of race, retaliation, sex, and "other." On May 8, 1991, in a third EEOC charge, he complained that TDCJ did not [re]hire him because of his participation in the instant suit. Brooks moved to intervene in

this suit on 11/29/95 (file instrument #154).

Detailing the history of his employment by TDCJ, Brooks states that at the Clemens Unit, where he worked from for two years and ten months after being employed in August 1984, he was refused requested days off, was assigned to an outside post and a different shift after filing a grievance. At the Eastham Unit, where he was transferred on June 15, 1987, his shift assignment was transferred from first to third, he was harassed by the Caucasian white staff for growing a mustache because of a medical skin problem and for carrying a briefcase, and he was written up several times for wearing inappropriate footwear.

Leading up to his termination, he states that when he was handed his suspension on September 31, 1987, he called the officer, Lieutenant Dover, who had written Brook up, a racist. That officer tried to seize Brooks, who grabbed a thermos bottle to defend himself. Dover then assigned Brooks to the Back Gate Picket. That evening, Dover called Brooks and told him to call in every thirty minutes. Claiming he had never had to do so before, Brooks asserts that it was because of their argument. Brooks called in only at 12:30 a.m. At 1:45 a.m. Dover sent him home.

All Brooks' claim other than his October 2, 1987 suspension and subsequent termination on October 26, 1987 are either time-barred because of failure to exhaust Title VII administrative procedures by filing an EEOC charge timely, since they arise from discrete events that should have triggered his awareness of the need to file an EEOC charge within one hundred eighty days, or because they do not constitute ultimate employment decisions actionable under Title VII.

TDCJ, with supporting evidence from Brooks' employment file, states that Brooks was suspended and terminated because he refused to comply with an order from the Eastham Unit warden while Brooks was on probation for other disciplinary actions. Pointing to a record of unexcused absences without notice to his supervisors and reprimands, TDCJ

emphasizes that on April 2, 1986 Brooks was demoted from CO III to CO II and placed on six months' probation for failure to report to work on March 4-5 and 11, 1986. Plaintiffs CC Ex. #40 or file instrument #172, Appendix B to Defendants' Second Supplemental Motion to Dismiss and First Supplemental Motion for Summary Judgment, Brooks at 2-10. He was also reported for unexcused absences on June 18, 1985, August 22, 1986, and December 7, 1986. *Id.* at 1 ,11, 12. After he failed to report for work on September 14, 1987, he was suspended without pay on September 23, 1987 and placed on six months' probation. *Id.* at 21-25. That same day, he was reprimanded for failing to load his weapon while on perimeter patrol, a serious breach of security, on August 31, 1987 and suspended for two weeks and placed on probation for six months. *Id.* at 13-16. He came back to work from the suspension on October 23, 1987. Then on October 26, 1987, Brooks, who was assigned to a perimeter picket, refused to follow the order of the warden on the Eastham Unit to call his supervisor from the picket every thirty minutes. TDCJ notes that Brooks had shortly before been cited for the same violation on September 30, 1987, with Officer Dover, the incident reported in Brooks' first EEOC charge. According to records in his employment file, he did not deny that he had not called in but argued that since it was a practice at the Eastham Unit only, and not an agency policy, he did not have to comply. *Id.* at 27-32. As noted in regard to Latson, a written order to that effect was posted at the pickets of TDCJ Units.

Warden George Waldron then ordered Brooks to appear in his office on October 23, 1987 and admonished him that failure to do so would result in a suspension without pay, pending a determination of the disciplinary charge. Brooks did not appear (*id.* at 28, 32-34), was suspended without pay, and on October 26,1987, after a disciplinary hearing that Brooks also failed to attend, Warden Waldron recommended that Brooks be terminated. Upon review and concurrence by the Personnel and Legal Departments, Lynaugh also reviewed and

approved the recommendation, effective November 25, 1987. *Id.* at 36.

Brooks has failed to show that TDCJ's reasons for his discipline and termination (a history of absences and insubordination culminating in his refusal to follow Warden Waldron's order on October 26, 1987) are pretextual and that they were really motivated by racial discrimination. Brooks has not shown severe or pervasive harassment of sufficient duration or intensity to constitute a hostile work environment.

GENERALLY

While Plaintiffs have argued that the procedure for determining who would get a promotion above the level of CO III was completely subjective and biased, because no Plaintiff has asserted an administratively exhausted, timely filed claim of a denial of promotion for which he or she applied and presented to the decision-makers his or her relevant qualifications and experience for the position sought, the Court does not reach this issue.[33]

Some Plaintiffs have alleged use of racial slurs by white officials. For instance Latson complains that he was called

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[33] The Court notes, however, that TDCJ presented evidence, especially through the testimony of Carol Blair Jones at the class certification hearing (TR V at 1185-VI at 6, 47-61) of TDCJ's efforts from 1984 on to develop a fair, uniform, and objective selection and/or promotion system for correctional supervisors, to utilize job-related questions compiled by people with knowledge of the substantive area of the position to be filled, to establish standardized forms for candidates, to select and train diverse board interviewers to implement the policy, to post vacant positions, to use sensitivity training, and to evaluate applicants on their skills and performance, education, and experience, not their race, by predetermined and objective standards. She personally also sat in on most promotion boards from 1985-87 as a non-voting personnel representative. The evolving promotion policy aimed to stay up with current research in Human Resources about how to select the most qualified applicant for a position and to develop a content-valid policy. TR VI 47.

"Nigger," "boy," Sambo," (TR III at 517-18) and other racially derogatory terms, while Kelly alleges that she was transferred in retaliation for filing a grievance against Lieutenant Tedford because he called her a "smart ass nigger" and "an educated nigger too smart for [her] own good."[34] TR IV at 86. These utterances are offensive, both objectively and subjectively, but Plaintiffs have failed to show that they were so severe or pervasive that they changed the terms and conditions of their employment, unreasonably interfered with their work performance, and destroyed their opportunity for success in the workplace. Nor have Plaintiffs alleged circumstances of discriminatory conduct that were physically threatening.

In an internal grievance filed on November 10, 1998, [35] Kelly also complained of abusive and foul language and jokes with racial and sexual connotations by Lieutenant Tedford. TR IV at 86-87. No EEOC charge was filed. IOCs dated January 3, 1989 and January 9, 1989 from Robin Lowe to Jana Nava [36] detail TDCJ's efforts to investigate the matter, confront

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[34] Kelly testified during the class certification hearing that Tedford gave her excellent job performance evaluations and recommended that she be considered for promotion. TR IV at 148.

[35] Kelly was also challenging her new assignment out of Indigent Supply Office and transfer to Building Recreation Administrative Segregation as based on race and retaliation for helping other officers file grievances. TR IV at 88. The same IOC cited above regarding Tedford's language and jokes indicates that an investigation demonstrated that the change was made not because of her race or in reprisal for an earlier file grievance, but pursuant to a staffing study and the resulting recommendations. Since only one of the three officers that worked in Indigent Supply was needed there, the officer with the greatest seniority, Wayne Hildebrandt, remained there, while Kelly and the other officer were given new assignments. Kelly has failed to show this reason was pretextual and that race or retaliation was the actual motive.

[36] Nava as made Chief of Labor Relations/EEO during the 1987 reorganization of TDCJ.

Tedford, make him aware of the complaint, and recommendation that unit officials disseminate a reminder that such conduct is not permitted. File Instrument #172, Appendix B, Kelly at 1-5. There is no other complaint in the file, so presumably the issue was resolved. The Court finds that TDCJ exercised reasonable care to prevent and to correct any such racially and/or sexually harassing behavior.

Some Plaintiffs have complained of Ku Klux Klan material being found at various posts, but there is no showing of the source of such materials or whether TDCJ had any knowledge or involvement in their appearance in the workplace. As for the graffiti slurs found on walls and table at the picket or on the desk in the central hall, there is no evidence identifying the perpetrator, and TDCJ did cover them with paint, but they reappeared. Again, the Court finds that, in light of all the circumstances, the graffiti was not so severe or pervasive that it changed the terms and conditions of their employment, unreasonably interfered with their work performance, and destroyed their opportunity for success in the workplace.

Charges that white officers were assigned to the new dormitory while black officers were assigned to the old, run-down dormitory that lacked heat are not cognizable under Title VII.

There was substantial testimony from a number of TDCJ officers, both Plaintiffs and non-Plaintiffs, indicating that Lieutenant Foster on the Retrieve Unit until his resignation in the September of 1986 was a racist first-shift supervisor who assigned white officers, especially those from his clique ("the silver bullet"), to the better and more desirable jobs in contravention of TDCJ's stated policy of rotating assignments. *See, e.g.*, Sergeant Jesse D. Robinson, V at 94-95, 103-07; Stanley Kinney, V at 113-12; Warden Glenn at V at 1123-28. Such job assignments are not ultimate employment decisions or adverse actions actionable under Title VII. Furthermore, there was credible evidence that when the problem came to TDCJ's attention, it made strenuous efforts to correct the situation.

Both Kinney, who is black, and Glenn testified that they were brought to Retrieve by TDCJ to identify the work-assignment and non-rotation problems created by Foster and to remedy them. After trying staff meetings with supervisors to discuss the issues and mandating rotation of shift employees and after meeting with Foster one-on-one, Glenn finally ordered Foster to move to a different shift and comply with the rotation policy. Foster resigned. Kinney: TR V at 1113-20; Glenn: TR V at 1127-28, 1143-44. *See also* Plaintiffs' Trial Ex. 9, Southern Regional Director Michael Moore's June 1986 IOC to all Southern Regional Wardens with instructions about rotation of assignments, racial slurs in the work place, and the professional attitude expected of supervisors toward their employees in the workplace.

CONCLUSION OF LAW

1. The Court has federal question subject matter jurisdiction of the Title VII, 42 U.S.C. §§ 2000e *et seq.*, and 42 U.S.C. § 1981 claims. 28 U.S.C. § 1343. Venue is proper under 28 U.S.C. § 1391.

2. In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974), the Supreme Court established the rule that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." In *Crown, Cork & Seal v. Parker*, 462 U.S. 345, 354 (1983), however, the Supreme Court further concluded that "[o]nce the statute of limitations has been tolled, it remains tolled for all members of theputative class until class certification is denied. At that point class members may choose to file their own suits or to intervene as plaintiffs in the pending action." The pendency of a previously filed class action does not toll limitations for additional class actions by putative members of the original asserted class. *Salazar-Calderon v. Presidio Valley Farmers Ass'n.*. 765 F.2d 1334, 1351 (5th Cir. 1985) ("Plaintiffs have no authority for their contention that

putative class members may piggyback one class action onto another and thus toll the statute of limitations indefinitely . . ."), *cert. denied*, 475 U.S. 1035 (1986); *Korwek v. Hunt*, 817 F.2d 874, 879 (2d Cir. 1987) ("The Supreme Court . . . certainly did not intend to afford plaintiffs the opportunity to argue and reargue the question of class certification by filing new but repetitive complaints."); *Robbin v. Fluor Corp.*, 835 F.2d 213, 214 (9th Cir. 1987) (following *Korwek*); *Andrews v. Orr*, 851 F.2d 146, 149 (5th Cir. 1988).

3. Although Moore, Ashton, Hollins, and Brice maintain that they can rely on properly exhausted claims asserted in two prior class actions, *Cirilo v. Texas Department of Corrections*, C.A. No. TY-77-12-CA, in the United State District Court for the Easterm District of Texas, Tyler Division, and *Jones et al. v. Texas Department of Corrections*, C.A. No. TY-87-364, in the same court, in both of which they tried unsuccessfully to intervene, the Court concludes that they cannot use the second class action, *Jones*, to extend the limitations time. Once the *Cirilo* class had been redefined by the Court in 1984[37] and the *Moore* Plaintiffs' motion to intervene in *Cirilo* was denied on September 3, 1987. *Moore* Plaintiffs who had already received

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[37] As stated in the *Cirilo* Consent Decree, Ex. 14 to Plaintiffs' Opposition (#176) to Second Supplemental Motion to Dismiss and Fist Supplemental Motion for Summary Judgment, the class was defined to include two groups:

> Subclass 1: any and all Mexican-Americans who were employed as correction officers by the Texas Department of Corrections who may have been terminated, harassed, or subject to derogatory language because of their national origin or denied the benefits of a non-discriminatory work environment due to TDC's alleged discriminatory hiring practices, at any time since July 5, 1976.
>
> Subclass 2: any and all Blacks who applied for employment as correction officers with TDC who may have been denied employment as correction officers with the TDC on account of their race, and any time since February 8, 1976.

right-to-sue notices regarding their previously filed EEOC charges had ninety days to file their class action to allow them to rely on the claims exhausted by *Cirilo* plaintiffs. *Crown, Cork & Seal*, 362 U.S. 345. Because this suit was not filed until February 2, 1988 and because they must rely on their own exhaustion efforts after *Cerilo*, their suit is time-barred.

4. Furthermore, the claims in *Cirilo* arise in a completely different period than those here, under different TDCJ policies and procedures and in different prison units. Moreover *Cirilo* dealt with discrimination against Hispanics and blacks in hiring, not an issue here and not concerned with the type of claims asserted here (promotion, transfer, discipline, and termination).

5. As a prerequisite to filing suit under Title VII, a plaintiff must file a charge of discrimination with the EEOC within one hundred eighty days after learning of the alleged illegal discriminatory conduct. 42 U.S.C. § 2000e-5(e)(1); *Crawford v. United States Steel Corp.*, 660 F.2d 663, 665 (5th Cir. 1981); *Allen v. United Steel Corp.*, 665 F.2d 689, 695 (5th Cir. 1982); *Messer v. Meno*, 130 F.3d 130, 134 & n.2 (5th Cir. 1997), *cert. denied sub nom. Texas Educ. Agency v. Messer*, 119 S.Ct. 794 (1999). The scope of judicial review is limited to those claims asserted in Plaintiffs' timely filed EEOC charge(s) or those reasonably expected to grow out of a charge during the EEOC's investigation. *Vuyanich v. Republican National Bank of Dallas*, 723 F.2d 1195, 1201 (5th Cir. 1984). Once a plaintiff receives a right to sue letter from the EEOC, a final agency action, permitting him ninety days to file suit to safeguard his claim, because he has had adequate notice, he must do so diligently, and equitable tolling does not apply. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984).

6. One exception to the exhaustion requirement is the "single filing rule": in a multiple-plaintiff, non-class action suit,[38]

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[38] In a class action the same rule applies. As long as one plaintiff files a timely EEOC charge on a claim he has standing to assert, the similarly situated class members need not also file individual, substantially identical

where one plaintiff has filed a timely EEOC charge with regard to his own claims, co-plaintiffs with claims arising out of similar discriminatory treatment during the same time period need not also file EEOC complaints. *Crawford*, 660 F.2d at 665-55. Where the original plaintiff's charge was not timely filed, other would-be non-filing plaintiffs and intervenors cannot rely on that untimely complaint. *Id.* at 665 n.7.

7. As another equitable exception to this statutory limitations period, the continuing violation doctrine was recognized by the Fifth Circuit in *Berry v. Board of Supervisors*, 715 F.2d 971 (5th Cir. 1983); *Huckaby v. Moore*, 142 F.3d 233 238 (5th Cir. 1998). Under the doctrine, the plaintiff need show more than a series of related acts, one or more of which falls within the limitations period; he must demonstrate "an organized scheme leading to and including that present violation . . . such that it is the cumulative effect of the discriminatory practice, rather than any discrete occurrence, that gives rise to the cause of action [citations omitted] ." *Id.* at 239. The standard is to a reasonably prudent person similarly situation "what event, in fairness and logic, should have alerted the average lay person to act to protect his rights." *Id.* at 238; *Glass v. Petro-Tex. Chem., Corp.*, 757 F.2d 1554, 1560-61 (5th Cir. 1985).

> The core idea of the continuing violations theory, however, is that equitable considerations may very well require that the filing periods not begin to run until the facts supportive of a Title VII charge or civil rights action are or should be apparent to a reasonably prudent person similarly situated. The focus is on what event, in fairness and logic, should have alerted the average lay person to act to protect his rights. At the same time, the mere perpetuation of the

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charges with the EEOC. *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498 (5th Cir. 1968).

> effects of time-barred discrimination does not constitute a violation of Title VII in the absence of independent actionable conduct occurring within the statutory period. Thus a plaintiff can avoid a limitations bar for an event that fails to fall within the statutory period where there is a persisting and continuing system of discriminatory practices in promotion or transfer that produces effects that may not manifest themselves as individually discriminatory except in cumulation over a period of time.

Huckaby, 142 F.3d at 238-39, *citing Glass*, 752 F.2d at 1560. Factors to be considered include whether "the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation," whether the alleged acts are "recurring . . . or more in the nature of an isolated work assignment or employment decision," and perhaps most important, whether "the act [has] the degree of permanence that should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate." *Huckaby*, 142 F.3d at 239. In other words, under the continuing violation theory, "equitable considerations may very well require that the filing periods not begin to run until facts supportive of a Title VII charge or civil rights action are or should be apparent to a reasonably prudent person similarly situated." *Webb v. Cardiothoracic Surgery Associates of North Texas, P.A.*, 139 F.3d 532, 537 (5th Cir. 1998). Demotions, suspensions, discharges, failures to promote and other adverse actions that had material and obvious effect on an individual's employment status are discrete acts to which the continuous violation doctrine does not apply. *Huckaby*, 142 F.3d at 239.

8. Because the elements of the alleged parallel violations of § 1981 and of Title VII are identical here, the same burden-shifting analysis under *McDonnell Douglas Corp. v. Green*, 411

U.S. 792, 802-03 (1973) applies to both. *Flanagan v. Aaron E. Henry Community Health Servs. Ctr.*, 876 F.2d 1231, 1233 (5th Cir. 1989); *Anderson v. Douglas & Lomason Co., Inc.*, 26 F.3d 1277, 1284 n.7 (5th Cir. 1994), *cert. denied*, 513 U.S. 1149 (1995). The amendments of the Civil Rights Act of 1991 to Title VII and to section 1981 do not apply retroactively to claims arising before their effective date, November 21, 1991. *Landgraf v. USI Film Products, Inc.*, 511 U.S. 244 (1994). The 1991 amendments apply here only to Plaintiff Chester R. Young's claim of denial of promotion to Food Manager II, which arose after the effective date.

9. Section 1981 provides in relevant part, "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts. . . as is enjoyed by white citizens." 42 U.S.C. § 1981 (West 1981). "The right to make contracts prohibits the employer from refusing to hire someone because of their race or from offering to hire someone only on discriminatory terms." *Carter v. South Central Bell*, 912 F.2d 832, 838 (5th Cir. 1990), *cert. denied*, 501 U.S. 1260 (1991). "The right to enforce contracts is the `right of access to legal process that will address and resolve contract-law claims.'" *Id.*

10. In *Patterson v. McClean Credit Union*, 491 U.S. 164, 175-77 (1989), the Supreme Court held that § 1981's guarantee of the right to make contracts did not extend to conduct occurring after the formation of the employer-employee contract and that a § 1981 claim would lie only if the discriminatory conduct complained of resulted in a "new and distinct" contractual relationship between the employer and the employee. *Id.* at 185-86. Although Congress in the Civil Rights Act of 1991 legislatively reversed *Patterson's* holding that the only conduct actionable under § 1981 is discrimination involving

impairment of specific rights to make or enforce contracts,[39] the 1991 amendment does not apply retroactively to claims here, but only to Young's claim of denial of promotion to Food Manager II. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994); *Johnson v. Uncle Ben's Inc.*, 965 F.2d 1363, 1374 (5th Cir. 1992), *cert. denied*, 511 U.S. 1068 (1994). Therefore *Patterson*, which determined that racial harassment in the course of employment is not actionable under § 1981, controls the pre-1991 claims under § 1981 in this suit. Under the *Patterson* standard, "routine increases in salary and responsibility which are clearly part of an original contract of employment do not signal a new employment relation." *Uncle Ben's*, 965 F.2d at 1370. "'It would be odd to regard each rung on the career ladder as a different employment relations.'" *Id.*, *quoting McKnight v. General Motors Corp.*, 908 F.2d 104, 107 (7th Cir. 1990). Claims based solely on racial harassment are not actionable under the original pre-1991 § 1981. *Carter*, 912 at 839. Under Fifth Circuit law at the time, § 1981 does not prevent an employer from firing an employee because of his or her race. *Id.*, *citing Walker v. South Central Bell Tel.*, 904 F.2d 275, 276-77 (5th Cir. 1990). Nor does it protect employees from retaliatory discharge. *Carter*, 912 F.2d at 840.

11. The Court concludes that none of Plaintiffs have demonstrated that his or her claims are cognizable under the applicable § 1981 statutory and case law.

12. To prevail on their Title VII race discrimination claims, Plaintiffs must show that they were treated differently from similarly situated individuals because of their race. *Willingham v. Macon Tele. Publishing Co.*, 507 F.2d 1084, 1088 (5th Cir. 1975).

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[39] Section 1981 now states, "For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b).

13. If the plaintiff lacks direct evidence of discrimination, plaintiff asserting a claim for a racially discriminatory failure to promote or discriminatory demotion or discriminatory termination under Title VII or section 1981 must initially use circumstantial evidence to make a *prima facie* case by showing by a preponderance of the evidence that (1) he or she was a member of the protected class, (2) he or she was qualified or the position sought or from which he or she was demoted or discharged, (3) that he or she was not promoted, was demoted or was discharged, i.e., suffered an "adverse employment action,"[40] and (4) that after the discharge or demotion or denial of promotion the desired position was filled by the employer with a non-minority person. *McDonnell Douglas Corp. v. Green*, 411 U.S. 702, 802 (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981); *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 818 (5th Cir. 1982), *cert. denied*, 459 U.S. 1038 (1982).

14. Once a plaintiff has made out a *prima facie* case of employment discrimination, a presumption arises that the employer unlawfully discriminated against the employee and the burden of production (but not the ultimate burden of persuasion, which remains throughout with the plaintiff) shifts to the defendant. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993). With some admissible evidence that, if believed by the trier of fact, would support a finding that unlawful discrimination was not the reason for the adverse employment action, the defendant employer must articulate a legitimate,

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[40] "Adverse employment actions" have been defined by the Fifth Circuit to include formal reprimands, demotions, discharges, refusals to hire, and refusals to promote. *Benningfield v. City of Houston*, 157 F.3d 369, 377 (5th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3505 (Feb. 4, 1999); *Pierce v. Texas Dep't of Crim. Justice, Inst. Div.*, 37 F.3d 1146, 1149 (5th Cir. 1994). "[A] plaintiff's subjective perception that a demotion has occurred is not enough" to constitute an adverse employment decision. *Forsyth v. City of Dallas*, 91 F.3d 769, 774 (5th Cir. 1996).

nondiscriminatory reason for the adverse employment action it took against the plaintiff which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action. *Id.* at 507; *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 992-93 (5th Cir. 1996), *rehearing en banc*, 85 F.3d 989 (5th Cir. 1994) (en banc). If the defendant succeeds, the presumption of unlawful discrimination raised by the *prima facie* case disappears and the burden of production shifts back to the plaintiff to prove by a preponderance of the evidence and with a "heightened level of specificity" that the proffered reason is mere pretext and that the employer's actual intent was discriminatory. *St. Mary's Honor Center*, 509 U.S. at 507 (1993); Mayberry v. Vought Aircraft Co., 55 F.3d 1086, 1090 (5th Cir. 1995); *Walton v. Bisco Industries, Inc.*, 119 F.3d 368 (5th Cir. 1997) (plaintiff must show both pretext and actual discriminatory motive). To show pretext, the plaintiff must show both that the defendant's articulated reason for the adverse employment action is false and that unlawful discrimination was the actual motive. *St. Mary's Honor Center*, 509 U.S. at 507 113 S.Ct. at 2752. *Rhodes v. Guiberson Oil Tools*, 39 F.3d 537, 542 (5th Cir. 1994), *rehearing*, 75 F.3d 989, 993 (5th Cir. 1994) (*en banc*); *Equal Employment Opportunity Comm'n v. Texas Instruments, Inc.*, 100 F.3d 1173, 1180 (5th Cir. 1996). There must be evidence to show that the employer's reason is not worthy of credence; a mere shadow of a doubt is not sufficient. *EEOC v. Louisiana Office of Community Services*, 47 F.3d 1438, 1443-44 (5th Cir. 1995). Conclusory allegations, unsubstantiated assertions and subjective beliefs are not sufficient to support a discrimination claim. *Grimes v. Texas Department of Mental Health and Mental Retardation*, 102 F.3d 137, 139 (5th Cir. 1996); *id.* at 1448 (holding that an employee's subjective belief of discrimination alone will not warrant judicial relief).

15. Once a case has been tried on the merits, however, the required framework of shifting burdens of proof is no longer applicable, and the only issue is whether plaintiff has shown by

sufficient evidence that a reasonable trier of fact could find that the defendant intentionally discriminated against him based on his race or in retaliation for a protected activity in denying the plaintiff benefits or altering terms and conditions of his employment. *Travis v. Board of Regents of the Univ. of Texas Sys.*,122 F.3d 259, 263 (5th Cir. 1997), *citing Rhodes v. Guiberson Oil Tools*, 75 F.3d at 993. The Court nevertheless may look to whether the plaintiff has produced evidence sufficient to establish a *prima facie* case in determining whether the evidence supports an ultimate finding of discrimination under Title VII and § 1981.

16. To make out a *prima facie* case of retaliation under Title VII, 42 U.S.C. § 2000e-3(a), a plaintiff must demonstrate (1) that he engaged in an activity protected by Title VII, (2) the employer took an adverse employment action against him, and (3) there was a causal connection between the protected activity and that adverse reaction. *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1092 (5th Cir. 1995). If he succeeds, the burden shifts to the defendant to show some legitimate, nondiscriminatory reason for its adverse action. The plaintiff must then show the reason if pretextual and that but for the protected activity, he would not have suffered the adverse employment action. *Id.*

17. Where a plaintiff is accused of violating a work rule, the plaintiff must establish a *prima facie* case by demonstrating either that he did not violate the rule or, if he did, that white employees who engaged in "nearly identical" conduct were not similarly disciplined. *Mayberry v. Vought Aircraft Co.*, 55 F. 3d 1086, 1092 (5th Cir. 1995). The *McDonnell* shifting burden of proof analysis applies to such a claim.

18. Title VII was intended to address "ultimate employment decisions," such as hiring, granting leave, discharging, promoting, and compensating, but "not to address every decision, made by employers that might arguably have some tangential effect upon those ultimate decisions." *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995) (denial of training

necessary for promotion did not constitute an adverse action); *Webb v. Cardiothoracic Surgery Assoc.*, 139 F.3d 532, 540 (5th Cir. 1998) (rude and uncivil treatment is not an adverse action); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir.) (hostility from fellow employees, events such as disciplinary filings, supervisor's reprimands and poor performance by an employee do not amount to an adverse action), *cert. denied*, 118 S.Ct. 336 (1997); *Messer v. Meno*, 130 F.3d 130, 140 (5th Cir. 1997) (criticism of and failure to listen to employee do not constitute an adverse action), *cert denied*, 119 S.Ct. 794 (1999); *Burger v. Central Apartment Management, Inc.*, 1999 WL 101392 *3-4 (5th Cir. Mar. 16, 1999) (purely lateral transfer is not an ultimate employment decision). Denial of administrative complaints and internal grievances do not constitute ultimate employment decisions in and of themselves. *Dollis*, 77 F. 3d at 782. Nor does merely changing an employee's work schedule, shift or hours or increasing an employee's workload, all of which are merely administrative decisions and do not constitute the type of ultimate employment decisions contemplated by Title VII unless, when objectively viewed, it amounts to a demotion. *Benningfield v. City of Houston*, 157 F.3d 369, 377 (5th Cir, 1998), *petition for cert. filed*, 67 U.S.L.W. 3505 (Feb. 4, 1999); *Harris v. Victoria Indep. School Dist.*, 1999 WL 74203 *3 (5th Cir. Mar. 4, 1999). Promotion decisions and formal disciplinary actions are ultimate employment decisions under Title VII. *Dollis*, 77 F.3d at 782; *Mattern*, 104 F.3d at 707.

19. In a Title VII case, "the general rule [is] that differences in qualifications between job candidates are generally not probative evidence of discrimination unless those differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue." *Deines v. Texas Department of Protective and Regulatory Services*, 164 F.3d 277, 278 (5th Cir. 1999). Title VII is not intended to be a means for the court or a jury to second-guess an employer's

business decisions. *Id.* at 280-81, *citing Walton v. Bisco Industries, Inc.*, 119 F.3d 368, 372 (5th Cir. 1997), and *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 959 (5th Cir. 1993). Nor does the court try the validity of the defendant's good faith belief that one employee is more competent than another. *Id.* at 281, *citing Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1091 (5th Cir. 1995). The Fifth Circuit has clearly stated,

> Therefore apart from searching for discriminatory intent, it is not the function of the [trier of fact] to scrutinize the employer's judgment as to who is best qualified to fill the position; nor is it the jury's task to weight the respective qualifications of the applicants. Whether the employer's decision was the correct one, or the fair one, or the best one is not a question within the [trier of fact's] province to decide. The single issue for the trier of fact is whether the employer's selection of a particular applicant over the plaintiff was motivated by discrimination.

Id., citing St. Mary's Honor Center, 509 U.S. at 511.

20. A system of promotion based on subjective criteria is not "discriminatory per se." *Page v. U.S. Industries, Inc.*, 726 F.2d 1038, 1046 (5th Cir. 1984). "[P]romotion systems utilizing subjective evaluations by all white supervisors" can be evidence of discrimination in disparate treatment cases. *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 827 (5th Cir. 1982) (*quoted by, Douglas & Lomason*, 26 F.3d at 1292), *cert. denied*, 459 U.S. 1038 (1982). Nevertheless, "the use of subjective or discretionary decision-making does not itself create an inference of discriminatory conduct." *Anderson v. Douglas & Lomason, Co.*, 26 F.3d at 1284.

21. The constructive discharge doctrine is a legal substitute for the third (discharge) element of a *prima facie* case of discrimination. *Junior v. Texaco, Inc.*, 688 F.2d 377, 378 (5th

Cir. 1982). To demonstrate a constructive discharge, a plaintiff must show that his or her working conditions were so difficult or unpleasant that a reasonable person in his or her shoes would have felt compelled to resign. *Cortes v. Maxus Exploration Co.*, 997 F.2d 195, 200 (5th Cir. 1992); *Bourque v. Powell Electric Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980) (endorsing reasonable employee test to determine "if the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into involuntary resignation"). Constructive discharge requires an active intent on the part of the employer to get rid of the employee by making working conditions so intolerable that the employee is forced into involuntary resignation. *Mattern v. Eastman Kodak*, 104 F.3d at 715. The general rule is that if an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer is liable for a constructive discharge as if he had formally discharged the aggrieved employee. *Jurgens v. EEOC*, 903 F.2d 386, 390 (5th Cir. 1990); *Uqalde v. W.A McKenzie Asphalt Co.*, 990 F.2d 239 (5th Cir. 1993). Constructive discharge is an issue of fact. *Cortes*, 977 F.2d at 200.

22. The employee has the burden of proving constructive discharge. *Jurgens*, 903 F.2d at 390; *Boze*, 912 F.d at 804-05; *Uqalde*, 990 F.2d at 243. Nevertheless the plaintiff does not have to prove that his or her employer imposed intolerable working conditions with the specific intent to force the employee to resign. *Jurgens*, 903 F.2d at 390, *citing Bourque*, 617 F.2d at 65 & n.5. The determinative factor is not the employer's intentions, but the effect of the conditions on a reasonable employee, i.e., an objective standard. *Jett v. Dallas Independent School Dist.*, 798 F.2d 748 (5th Cir. 1986), *aff'd* 491 U.S. 701 (1989). A constructive discharge cannot be based upon an employee's subjective preference for one position over another. *Jett*, 798 F.2d at 755. A failure to promote alone does not constitute a constructive discharge. *Boze v. Branstetter*,

912 F.2d 801, 805-05 (5th Cir. 1990) (and cases cited therein). In *Barrow v. New Orleans S.S. Ass'n.*, 10 F.3d 292, 297 (5th Cir. 1994), the Fifth Circuit indicated that the resignation of a plaintiff must be reasonable under all the circumstances and provided a nonexhaustive list of factors to consider in determining whether the employer made the employee's working conditions so intolerable that a reasonable person would feel compelled to resign: (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger supervisor; (5) badgering, harassment or humiliation by the employer calculated to encourage the employee's resignation; or (7) offers of early retirement on terms that would make the employee worse off whether the offer was accepted or not. Furthermore, to prevail on a constructive discharge in a hostile work environment claim, a plaintiff must "demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove a hostile work environment claim." *Landgraf v. USI Film Prods.*, 968 F.2d 427, 429 (5th Cir. 1992), *aff'd*, 114 S.Ct. 1483 (1994), *cited for that proposition by Weller v. Citation Oil & Gas Corp.*, 84 F.3d 191, 195 n.7 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 682 (1997).

23. Noting that other than the few plaintiffs still employed by TDCJ who might benefit from some prospective injunctive relief, TDCJ frequently argues in pleadings that since the others do not seek reinstatement, unless a plaintiff demonstrated a racially discriminatory discharge, denial of promotion, or suspension without pay, he has no claim for back pay. Because Title VII provides no monetary relief other than lost back wages, TDCJ contends that other claims not resulting in lost back pay should be dismissed. In recent cases dealing with a sexually hostile work environment claim and the imposition of vicarious liability on the employer where a supervisor of an employee perpetrates severe or pervasive harassment in the workplace, the United States Supreme Court has indicated that its use of agency principles to establish that vicarious liability for

abuse of supervisory authority should apply uniformly under Title VII, including to racial discrimination. *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 2283 n.1 (1998) ("Although racial and sexual harassment will often take different forms, and standards [may] not be entirely interchangeable, we think there is good sense in seeking generally to harmonize the standards of what amounts to actionable harassment."). *See also id.* at 2290 n.3 (the court's "obligation . . . is to adapt agency concepts to the practical objectives of Title VII.") *See Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 64 (1986) (the language of 42 U.S.C. § 2000e-2(a)(1) ("making it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin") "evinces a congressional intent `to strike at the entire spectrum of disparate treatment of men and women' in employment," which includes requiring people to work in a discriminatorily hostile or abusive environment); *Deffenbaugh-William v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 593 (5th Cir. 1998), *rehearing en banc granted and op. vacated, Williams v. Wal-Mart Stores, Inc.*, 1999 WL 107104 (5th Cir. Feb. 26, 1999). Noting the wording of § 2000e-2(a)(1), the United States Supreme Court has clearly stated that the scope of Title VII's prohibition is not limited to "economic" or "tangible employment action" (e.g., a discharge, demotion, undesirable reassignment, or failure to receive an increase or bonus) discrimination.[41] *Faragher v. City of Boca Raton*, 118 S.Ct. at 2282 (1998), *citing Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993), *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986), and *Oncale v.*

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[41] A tangible employment action "requires an official act of the enterprise, a company act" such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Industries, Inc. v. Ellerth*, 514 U.S. 742,_, 118 S.Ct. 2275, 2268-69 (1998).

Sundowner Offshore Services, Inc., 523 U.S. 75, __ 118 S.Ct. 998, 1001 (1998). Covering more that"`terms and conditions' of employment in the narrow contractual sense," Title VII reaches harassment "so severe or pervasive" as to "alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* Indeed, "Title VII was only meant to bar conduct that is so severe or pervasive that it destroys a protected class member's opportunity to succeed in the workplace." *Weller v. Citation Oil & Gas Corp.*, 84 F.3d 191, 194 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 682 (1997).

24. To demonstrate subjection to a hostile or abusive work environment based on race, a plaintiff must demonstrate (1) that he or she belongs to a protected group, here African American, (2) that he or she was subjected to unwelcome harassment, (3) that the harassment was based on race, (4) that the harassment affected a term, condition, or privilege of his or her employment, and (5) that the employer knew or should have known about the harassment and failed to take prompt remedial action. *DeAngelis v. El Paso Mun., Police Officers Ass'n.*, 51 F.3d 591, 593 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 367 (1995). The court should examine the totality of the circumstances in determining if an environment is hostile, including the following: the frequency and severity of the discriminatory conduct; whether the conduct was physically threatening or humiliating or merely an offensive utterance; and whether the conduct unreasonably interfered with the employee's work performance. *Harris v. Forklift System, Inc.*, 510 U.S. 17, 114 S. Ct. 367, 371 (1993). "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive working environment . . . is beyond Title VII's purview." *Id.* at 370. To constitute a hostile work environment where there is no "tangible" adverse employment decision, "the workplace must be permeated with `discriminatory intimidation, ridicule, and insult' that is sufficiently severe or pervasive to alter the conditions of victim's employment and create an abusive environment." *Id., quoting Meritor Savings Bank v. Vinson,*

477 U.S. 57, 65 (1986); *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 264 (5th Cir. 1999), concurring op., 1999 WL 98505 (5th Cir. Feb. 26, 1999).

25. The mere utterance of an ethnic slur that offends an employee by itself is not enough to create an objectively hostile or abusive work environment. *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972); *Indest v. Freeman Decorating, Inc.*, 164 F.3d at 263 ("conduct must be extreme to amount to a change in the terms and conditions of employment"; utterance of an offensive racial slur did not sufficiently alter the terms and conditions of employment to violate Title VII) (citing *Faragher*, 118 S.Ct. at 2284); *Harris*, 510 U.S. at 21 (The "`mere utterance of an . . . epithet which engenders offensive feelings in an employee' does not sufficiently affect the conditions of employment"). *Accord*, *Meritor Savings Bank*, 477 U.S. at 67. Nor does a single comment constitute a pattern of behavior necessary to support a Title VII claim. *Anderson v. Douglas & Lomason Co., Inc.*, 26 F.3d 1277, 1295 (5th Cir. 1994) (The mere utterance of a racial epithet is not indicia of discrimination under Title VII); *Jason v. Baptist Hospital*, 872 F. Supp. 1575, 1582 (E.D. Tex. 1994), *adopted*, 882 F. Supp. 578 (E.D. Tex. 1995). *See also Harris*, 114 S.Ct. at 371. Although a single remark by a subordinate or fellow employee is also insufficient, a remark uttered by a superior with control over the employee's working conditions might constitute an abuse of power and must be judged differently. *DeAngelis*, 51 F.3d at 596-97 (Title VII does not bar every insensitive or boorish remark make by employees in the workplace). *See Gearhart v. Eye Care Centers of America, Inc.*, 888 F. Supp. 814, 823 (S.D. Tex. 1995) (harassing incidents of inappropriate comments by supervisors over six weeks were "nothing more than some evidence of flirting, some casual touching, and sexual innuendos and jokes," not actionable as a hostile work environment claim, harassment must be severe or pervasive). To be actionable, the challenged conduct must be both objectively offensive, meaning that a reasonable person

would find it hostile and abusive, and subjectively offensive, meaning that the victim perceived it to be so. *Shepherd v. Comptroller of Public Accounts of the State of Texas*, 1999 WL 101383, *2 (5th Cir. Mar. 16, 1999), *citing Harris*, 510 U.S. at 21-22. The Fifth Circuit, regarding the need to show severe or pervasive misconduct to establish a hostile work environment in a sexual harassment case in order to impose vicarious liability on the employer, stated,

> Incidental, occasional or merely playful utterances will rarely poison the employee's working conditions to the extent demanded for liability. Discourtesy or rudeness, "offhand comments and isolated incidents (unless extremely serious) will not amount to discriminatory changes in `terms and conditions of employment.'" *Faragher*, 118 S.Ct. at 2283. All of the sexual environment cases decided by the Supreme Court have involved patterns or allegations of extensive, long lasting, unredressed, and uninhibited sexual threats or conduct that permeated the plaintiffs' work environment. [citing *Faragher*, *Burlington Industries v. Ellerth*, 118 S. Ct. 742 (1998); *Harris*, and *Meritor*] The extreme facts recited in those cases highlight the intensity of the objectionable conduct that must be present in order to constitute an actionable hostile environment claim.

Indest, 164 F.3d at 264. To establish discrimination, a plaintiff must prove specific comments over a lengthy period of time. *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 656 (5th Cir. 1996); *see also Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1266 (7th Cir. 1991) (discrimination prevalent where employee was nicknamed "Buckwheat," generally considered a racial slur, for the first ten years of employment and subjected to other racial taunts). Furthermore, absent a causal connection between

isolated remarks and the conduct complained of, racial epithets become stray remarks that cannot support a discrimination verdict. *Ray v. Tandem Computers*, 63 F.3d 429, 434 (5th Cir. 1995).

26. Where the harassment by a supervisor has not culminated in a tangible employment action, an employer that has promulgated an anti-harassment policy with a complaint procedure or a policy suitable to the employment situation, an employer may raise an affirmative defense that looks to the reasonableness of the employer's conduct in seeking to prevent and to correct harassing conduct and avoid harm. *Faragher*, 118 S.Ct. 2275.

27. "A disparate impact model is not the appropriate vehicle from which to launch [a wide-ranging attack on the cumulative effects of TDCJ's employment practices." *Anderson v. Douglas & Lomason Co.*, 26 F.3d at 1284. Plaintiffs' charge of discriminatory and disproportionate discipline, promotion, discharge, living quarter assignments, job assignments, shift assignments and transfers, as well as a racially hostile work environment with racial slurs and jokes, graffiti, and Ku Klux Klan literature, at a number of different Units in the TDCJ system, without identification of a specific, facially neutral policy that they demonstrate causes a disparate impact on African Americans, is properly analyzed under the disparate treatment model. *Id.*

Any of the Court's findings of fact that should be construed as conclusions of law, or vice versa, are hereby adopted as such.

In light of the above findings of fact and conclusions of law, the Court concludes that final judgment should issue by

separate instrument in favor of Defendants and that Plaintiffs shall take nothing and shall bear all costs of court.

SIGNED on this 30th day of March, 1999 at Houston, Texas.

/s/ MELINDA HARMON
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
AUG 10 1995
Michaed M. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT L. MOORE, CHESTER R. YOUNG, LINDA BAKER, LORENDA WASHINGTON, ROYAL R. ASHTON, DAVID HOLLINS, RANDALL BYRD, LEON BRICE, AND RONNIE HUDNALL, ON THEIR OWN BEHALF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,	§	
Plaintiffs	§	
VS.	§	CIVIL ACTION
	§	NO, H-88-0295
TEXAS DEPARTMENT OF CRIMINAL JUSTICE-INSTITUTIONAL DIVISION AND JAMES A. LYNAUGH, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE,	§	
Defendants	§	

FINDINGS OF FACT, CONCLUSIONS OF LAW, MEMORANDUM, AND ORDER

Pending before the Court in the above referenced cause asserting employment discrimination based on race,[1] seeking monetary and injunctive relief, and grounded in Title VII, 42 U.S.C. §§ 2000e *et seq*., is Plaintiffs Robert L. Moore, Chester R. Young, Linda Baker, Lorenda Washington, Royal R. Ashton, David Hollins, Randall Byrd, Leon Brice, and Ronnie Hudnall's amended motion for class certification (instrument #56). Plaintiffs seek certification of a proposed class[2] composed of all black correctional officers employed by defendant the Department of corrections ("TDC") [3] during the period from September 16,

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[1] Plaintiffs allege in their fourth amended complaint that they have been discriminated against by Defendents and by the policies, practices, customs and usages maintained by Defendants, in matters of compensation, promotion, transfers, job assignments, disciplinary matters, and other terms conditions and privileges of employment, and that they have been retaliated against whenever they file charges of discrimination with appropriate agencies.

[2] Plaintiffs proposed class is currently defined as follows:
All Black correctional officers emploted with the Texas Department of Correction or Texas Department of Criminal Justice for any period from September 16, 1977 through the currentday.

[3] Since September 1, 1989, as a result of atatutory reorganization, TDC is known as the Texas Department of Criminal Justice–Institutional Division ("TDCJ").

1977[4] through the present, pursuant to Fed. R. Civ. P. 23(b)(2).[5] Plaintiffs maintain that there was a systematic continueing

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[4] Plaintiffs filed this suit on February 2, 1988 after they attempted, ultimately unsuccessfully, to intervene in two putative class action suits filed in the Eastern District of Texas, Tyler Division: *Cirilo v. TDC* (C.A. No. TY-77-12-CA), filed on February 23, 1987, and *Jones v. Texas Department of Corrections* (C..A. No. TY-87-364-CA), in which the Plaintiffs filed a motion to intervene on September 17, 1987 after its severance from *Cirilo*. Plaintiffs claim that the then ninety-day Title VII limitations period for filing suit was tolled when Plaintiffs sought to intervene in *Jones*, and that they can take advantage of Jones' EEOC-chargfe-filing date in defining the temporal scope of their class action. On September 30, 1991 Judge William Wayne Justice issued a judgment in favor of Jones' individual claims and mooted class claims in *Jones* suggesting that an adequatre class representative might provide new opportunity for a class action.

[5] A private party seeking to maintain a class action under Title VII must satisfy the prerequisites of Fed. R. Civ. P. 23(a). The purpose of Rule 23 is to promote judicial economy and efficiency by allowing for litigation of common question of law and fact at one time. *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979). The alleged applicable ground for class certification here, Rule 23(a) and (b) (2), provides in relevant part,

> (a) Prerequisities to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . .

violation of Title VII.

A hearing was held by this Court on the amended motion for class certification on December 19-21, 1994 and April 4-6, 1995, after which the parties submitted further summations to supplement the already extensive briefing in the record on the issue of certification. At the hearing, named Plaintiffs Robert Moore, Chester Young, Chris Latson, and Ronnie Hudnall and witness Annie Kelly testified. Now after reviewing the substantial record compiled in this case and the applicable law, this Court concludes that Plaintiffs' amended motion for class certification should be denied because named Plaintiffs do not adequately represent the proposed class. Moreover it appears to the Court that they may be attempting use an overbroad, shotgun class action as a device to circumvent requirement for timely filing of EEOC charges that cover the claims they assert here[6] and to expand unjustifiably the already substantial temporal and geographical scope of their suit.[7]

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(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

[6] The state points out in its opposition to the motion for class certification that the evidence submitted with its motion for summary judgment reveals that while the named Plaintiffs' EEOC charges assert discrimination complaints regarding promotion, termination, retaliation, and discipline, they do not touch on job assignments, transfers, compensation or "other terms, conditions and privileges of employment."

[7] To bring claims for violations of Title VII either individually or as a class, plaintiffs must exhause administrative remedies by filing EEOC charges which would reasonably give rise to an investigation that would embrace the charges they later seek to assert in federal district court. The scope of class clains is necessarily limited to those

In determining the propriety of certifying a class action, the issue is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but insteas only whether the prerequisites of Fed. R. Civ. P. 23 have been met. *Redditt v. Mississippi Extended Care Centers, Inc.*, 718 F.2d 1381, 1388 (5th Cir. 1983), *citing Eisen v. Carlisle and Jacquelin* 417 U.S. 156 (1974); *Wagner v. Taylor*, 836 F.2d 578 (D.C. Cir. 1987). The decision whether to certify a class lies within the sound discretion of the Court, even where the requirements of Fed. R. Civ. P. 23 are met. *Montelongo v. Meese*, 803 F.2d 1341, 1351 (5th Cir. 1986), *cert. denied*, 481 U.S. 1048 (1987); *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 471-72 (5th Cir. 1986).

The prerequisites of numerosity, commonality, typicality, and adequacy of representation delineated in Rule 23(a) are not discrete concepts but tend to merge and simultaneously reveal whether a class action is an exomonical method of adjudicating class claims and whether the named plaintiffs' claims and putative class claims are "so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982) (holding that a plaintiff who alleged that he had been discriminatorily denied a promotion was not a proper representative for a class clain of discriminatory hiring practices). Because class actions bind absent class members , the protection of absentee interests is mandated not only by Rule 23, but by due process concerns of the federal Constitution. *Hansberry v. Lee*, 311 U.S. 32, 42 (1940). Through Rule 23's prerequisites of commonality, typicality, and adequacy of representation, the United States

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encompassed within the named plaintiffs' EEOC charges. *Vuyanich v. Republic Nat'l Bank of Dallas*, 723 F.2d 1195, 1199 (5th Cir. 1984), *cert. denied*, 469 U.S. 1073 (1984).

Supreme Court in *Falcon*[8] emphasizing the need to protect absentee interests of putative class members, has placed restrictions on across-the-board suits that combine claims embracing numerous areas of employment discrimination, such as hiring, promotions, transfers, termination, discipline, retaliation, etc., rather than focusing on a single type of claim. "[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *Id.* At 156. Moreover if the named plaintiff is not qualified for the position he claims he was denied, he cannot have suffered the injury as a matter of discriminatory practices and is not a proper representative of individuals who did suffer injury. *Id.* "The mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer." *Id.* At 159 n.15. "If one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential companywide class action." *Id.* At 159. Allegations of across-the-board national orgin or racial discrimination by an employer do not automatically give rise to a class action:

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his

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[8] Before the United States Supreme Court issues *Falcon*, the majority rule among the circuits, including the Fifth Circuit which created the practice, was that across-the-board attacks on racially discriminatory employment practices were permissible where plaintiffs showed that they and the class they chose to represent were of the same race or national origin. *See, e.g., Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124 (5th Cir. 1969). Thus a Title VII class could include employees holding different jobs, working in different organizational or geographic units, or involving applicants, future employees and former employees.

> otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims. [The representative plaintiff] must prove much more than the validity of his own claim. Even though evidence that he was passed over for promotion when less deserving whites were advanced may support the conclusion that [he] was denied the promotion because of his national origin [or race], such evidence would not necessarily justify the additional inferences (1) that this discriminatory treatment is typical of [the employer's] promotion practices, (2) that [the employer's] promotion practices are motivated by a policy or discrimination that pervades the [employer's] division or (3) that this policy of [racial] discrimination is reflected in [the employer's] other employment practices, such as hiring, in the same way it is manifested in the promotion practices. These additional inferences demonstrate the tenuous character of any presumption that the class claims are "fairly encompassed" within [the named plaintiff's] claims.

Falcon, 457 U.S. at 157-58.

Falcon did not totally preclude across-the-board class actions in Title VII cases. The Supreme Court recognized "that racial discrimination is by definition class discrimination," 457 U.S. at 157. Moreover in a footnote, the Court stated, "Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself

in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes." *Id.* At 159 n.15. Nevertheless the Court went on to add, "In this regard it is noteworthy that Title VII prohibits discriminatory employment *practices*, not an abstract policy of discrimination. The mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer." *Id.* The Supreme Court, furthermore, did not define what it meant by "significant proof."

After reviewing the record and the requirements of Rule 23, this Court concludes that class certification should be denied on the grounds that the named Plaintiffs do not adequately represent the proposed class and that the broad spectrum of allegations here constitute an impermissible, across-the-board discrimination suit based on race that attacks nearly every employment practice and every employment decision made by TDCJ in every one of its units or divisions and at every level, with respect to the putative class. The named Plaintiffs possess limited individual claims yet assert claims for a vastly wider class which they propose to represent but that they have failed to show are either common or typical of their personal claims and that relate to alleged employment practices that have not adversely affected them. In other words, the named Plaintiffs' claims lack a sufficient nexus with those of the expansive proposed class. Named Plaintiffs "must allege and show that they personally have been injured, not that injury has been suffered by other unidentified members of the class to which they belong and which they purport to represent." *Warth v. Seldin*, 422 U.S. 490, 502 (1975). "It is not enough that the conduct of which the plaintiff complains will injure someone. The complaining party must also show that he is within the class of persons who will be concretely affected. Nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating the

conduct of another kind, although similar, to which he has not been subject." *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 2784 (1983).

Even though there are only a handful of named Plaintiffs, the few of those who testified at the hearing were unqualified, performed inadequately at the jobs they sought,[9] failed to follow the required procedures for applying for a particular position, or fell outside the scope of the defined class, and therefore would be inadequate representatives of others who were responsible and qualified for the promotions, transfers, assignments, etc., that they sought. *See Falcon*, 457 U.S. at 156. Chester Hall conceded that his performance on qualifying examinations for electrical and plumbing maintenance jobs were very low. Moreover he was promoted to Food Service Manager, a position outside the security area for which the class certification is requested. Furthermore other challenged denials of promotions were also for positions outside the security chain. Chris Latson admitted that after he breached security by making a bathroom stop on an ambulance run in 1985, he was never promoted, but also that he never applied for a promotion. In 1955 Robert Moore sought to skip a step in the chain, to move from guard to lieutenant without ever working as a sergeant and with no prior security related experience before joining TDCJ. Furthermore, he testified that ultimately he stopped applying for promotions, even though applications were required to obtain

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[9] "[A] district court holding a pretrial certification hearing has no 'authority to conduct a preliminary inquiry into the merits of the suit,' . . . [but] evidence relevant to the commonality requirement is often intertwined with the Merits." *Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566, 1570 (11th Cir. 1992), quoting *Nelson v. United States Steel Corp.*, 709 F.2d 675, 679-80 (11th Cir. 1983) and citing *Falcon*, 457 U.S. at 160 ("Sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question"); *Brooks v. Southern Bell Telephone & Telegraph Co.* 133 F.R.D. 54, 56 (S.D. Fla. 1990).

an advancement. Evidence from and about Ronnie Hudnall indicated that he had a long disciplinary history for unexcused absences, ultimately leading to his termination. Plaintiff Annie Kelly complained that she was denied promotions to various administrative technician positions at the Wynne Unit during 1989-90, but these were not correctional positions. A good portion of the "evidence" of alleged systemwide discrimination consisted of unsupported conclusory allegations, hearsay, scuttlebutt, subjective beliefs, or unjustified extension of personal anecdotal experiences with one supervisor or decision maker at one prison unit.

As pointed out by TDCJ, the named Plaintiffs here complain mostly about treatment at the Retrieve Unit around 1985-1987, with some allegations about Ransey I, Eastham, Wynne, and Clemens Units. Yet by proposing a class action that has continued to expand temporally, both into the past and into the future, since the inception of this suit, they seek to embrace all black correctional officers[10] in a TDCJ that now

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[10] In the wake of *Falcon*, numerous courts have held that applicants, employees, future employees and former employees cannot belong to the same class or that employees holding diferent jobs or working in different locations or facilities were too heterogenous in interest for class certification. *See, e.g., Harriston v. Chicago Tribune Co.*, 992 F.2d 697 (7th Cir. 1993) (former employee who had been promoted to a managerial position could not maintain a class action on behalf of all black people who had been denied management positions); *Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566 (11th Cir. 1992) (affirming district court's denial of certification of a class challenging every employer practice with respect to that class); *Stott v. Haworth*, 916 F.2d 134 (4th Cir. 1990) (class treatment for claims of political patronage dismissals is inappropriate where positions held by employees were divergent, where the only common question was whether the positions were subject to patronage, and where judicial scrutiny required a case-by-case, position-by- position, activity-by-activity analysis); *Coon v. Georgia Pacific Corp.*, 829 F.2d 1563 (11th Cir. 1987) (Folliwing denial of her promotion, female former employee asserted an across-the-board sex discrimination complaint proposing as a

consists of three regions containing forty-eight penal institutions and six detention centers, of the vast majority of which they have no personal knowledge. They also allege not only ongoing employment discrimination, but they seek to extend their reach back to 1977 by using their motions to intervene in the *Jones* and *Cirilo* class actions, both of which are misleading because the claims, evidence, and witnesses in *Cirilo* and *Jones* were not the same as the across-the-board attack here. Equitable tolling of the statute of limitations to allow an out-of-time class action against Defendants when earlier suits, like *Cirilo* and *Jones* here, did not, is inappropriate. Indeed the only central similarity between the earlier suits and this one is the presence of the same Defendants. Plaintiffs also seek to balloon their claims against a few individuals, some former and some current employees, at a few prisons arising out of specific incidents into gereralized allegations covering thousands of officers in a multitude of jobs at varying levels without "significant proof" of systemwide discimination due to a general policy of discrimination. Moreover from a few job assignments or promotions, they aim for wholesale expansion to all job levels in a vast system. A claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the specific injury that gives rise to that claim. *Blum v. Yaretsky*, 457 U.S. at 999. Althought there was testimony about a major reorganization of the system under

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class all women applicants and employees that did not satisfy Rule 23(a) requirements for class certification); *Batesville Caasket Co. v. EEOO Litigation*, 35 Fair Empl. Prac. Cas. (BNA) 1560, 1564 (D.D.C. 1984) (holding that a former employee could not represent current or future employees) ;*Minority Police Officers Ass'n v. City of South Bend*, 555 F. Supp. 921, 924-25 (N.D. Ind. 1983) (holding that an employee could not represent former employees, future employees, or applicants); *Eastland v. Tennessee Valley Authority*, 704 F.2d 613, 617-18 (11th Cir. 1983) (barring nonmanagerial white-collar employee from suing on behalf of managerial staff), *cert. denied*, 104 S. Ct. 1415 (1984); *Castillo v. City of Phoenix*, 333 Fair Empl. Prac. Cas. (BNA) 1597, 1600 (D. Ariz. 1983) (prohibiting police recruit from representing police officers).

James Lynaugh in 1987, no distinctions are made in the across-the-board class complaint.[11] Finally, after listening to evidence at the hearing, the Court cannot help but note that the term "correctional officer" or "security guard" embraces work far beyond that normally understood by the common meaning of the words and that such a common job title obfuscates the tremendous variation in status, assignments, and duties encompassed, which work against the requisite unity of interests within the putative class.

Moreover, the evidence reflected that criteria for promotions within the system were not only subjective. The testimony of James E. Bush, personnel director of TDC, and the exhibits admitted during his testimony reflect the developing policies, procedures, and system for job posting, examinations, training requirements, review boards, interview rating sheets, etc. employed by the in evaluating applicants for promotions in a race-neutral manner. *See Vuyanich*, 723 F.2d at 1199-2000 (reliance "on two objective inputs–education and experience–in its necessarily subjective hiring process . . .precludes reliance on [*Falcon's*] "general policy of discrimination" exception").

Thus it appears to this Court that inadequacy of the named Plaintiffs to represent interests of the proposed class, the

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[11] The state has produced statistical data since 1986 about applicant flow and work force profiles for all correctional positions that that it claims reflect an absence of racial discrimination. Plaintiffs in turn have submitted evidence reflecting that from 1986-1990, although blacks never comprised over 27% of the total population, they comprised well over half of the terminations in contrast to whites, who constituted 34-39% of the terminations. Because the class complaint targets far more than termination, these statistics are of limited value in determining whether the proposed class should be certified. Moreover after reviewing the individual anecdotes of specific instances of alleged discrimination and the statistical evidence which is restricted in scope in light of the extensive claims, the Court finds that this evidence is insufficient to support an inference of a system-wide practice/pattern/policy of race discrimination in employment at TDCJ.

different time periods involved, the different locations, facilities, and job levels encompassed, and the widely varying nature of the claims militate against certification of what is clearly an overbroad class here.

Accordingly the Court

ORDERS that Plaintiffs' amended motion for class certification is DENIED. The Court further

ORDERS that this action is REFERRED to United States Magistrate Judge Frances Stacy to establish a Rule 16 docket control schedule as soon as possible.

SIGNED at Houston, Texas, this 8th day of August, 1995.

/s/ Melinda Harmon

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX D

U.S. COURT OF APPEALS
FILED
NOV 20 2000
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20547

ROBERT L. MOORE; CHESTER R. YOUNG;
LINDA BAKER; ROYAL R. ASTHTON;
DAVID HOLLINS; RANDALL BYRD; LEON
BRICE; RONNIE HUDNALL;
Plaintiffs - Appellants
WADE BROOKS;
Intervenor Plaintiff - Appellant
ANNIE M KELLY;
Appellant
CHRISTOPHER G. LATSON
Movant - Appellant
v.
JAMES A. LYNAUGH, individually and in his
official capacity as the Director of the
Texas Department of Criminal Justice;
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION
Defendants - Appellees

Appeal from the United States District Court
For the Southern District of Texas, Houston

ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Opinion 10/12/00, 5 Cir., ____, ____ F.3d ____)

Before JOLLY, HIGGINBOTHAM, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED.R.APP.P. and 5th CIR R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED.R.APP.P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Patrick E. Higginbotham /dl
United States Circuit Judge

REHG-4A

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY
OF THE MANDATE.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
MAR 31 1999
MICHAEL N MILBY, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT L. MOORE, CHESTER R. YOUNG, LINDA BAKER, LORENDA WASHINGTON, ROYAL R. ASHTON, DAVID HOLLINS, RANDALL BYRD, LEON BRICE, RONNIE HUDNALL, ANNIE M. KELLY, CHRISTOPHER LATSON, AND WADE BROOKS, Plaintiffs	}	
VS.	}	CIVIL ACTION NO. H-88-295
TEXAS DEPARTMENT OF CRIMINAL JUSTICE-INSTITUTIONAL DIVISION AND GARY L. JOHNSON INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF CRIMINAL JUSTICE, Defendants	}	

FINAL JUDGMENT

Pursuant to the findings of fact and conclusions of law issued on this day in the above referenced disparate treatment action alleging racial discrimination and retaliation in

employment, the Court

ORDERS that FINAL JUDGMENT on all claims is GRANTED in favor of Defendants Texas Department of Criminal Justice -- Institutional Division and Gary L. Johnson in his official capacity against Plaintiffs Robert L. Moore, Chester R. Young, Linda Baker, Royal R. Ashton, David Hollins, Randall Byrd, Leon Brice, Ronnie Hudnall, Annie M. Kelly, Christopher Latson, and Wade Brooks. Plaintiffs shall take nothing and shall bear all costs of court.

THIS IS A FINAL JUDGMENT.

SIGNED at Houston, Texas, this 30th day of March, 1999.

Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE